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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1938

## No. 252

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, AND SCHENLEY DISTRIBUTORS, INC., APPELLANTS,

*vs.*

ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED AUGUST 5, 1938.

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[fol. 1]

## IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

TEMPORARY RESTRAINING ORDER—Filed October 20, 1937

Upon this 20th day of October, 1937, this matter came on for hearing upon the plaintiffs' application for a temporary restraining order. Plaintiffs appeared by their attorneys, James P. Aylward, George V. Aylward and Terence M. O'Brien, and the Court having read, examined and considered the verified Bill of Complaint and affidavits filed herein, and being fully advised in the premises, and being of the opinion that immediate and irreparable injury, loss and damage will result to the plaintiffs unless a temporary restraining order is granted, Finds, Orders, Adjudges and Decrees:

1. The injury to plaintiffs, if the threatened action of the defendants is not enjoined, is that all of plaintiffs' business in the State of Missouri and plaintiffs' profits therefrom will be destroyed and the good will which now attaches to plaintiffs' business in the State of Missouri and which plaintiffs now own and enjoy will be wiped out and the value of plaintiffs' Missouri license will be destroyed.

2. Such injury, loss and damage to plaintiffs is and will be irreparable, in that such loss, injury or damage cannot be ascertained, and would not be recoverable from any persons responsible therefor, and could not be recompensed by money.

3. This temporary restraining order is granted without notice to the defendants or to the Governor of the State of Missouri because unless enjoined by the order of this Court [fol. 2] the defendant Thomas F. Fitzgerald will forthwith give notice in writing by mail to each holder of a liquor license in Missouri, and by publication in a newspaper of

general circulation in the State of Missouri of the fact that the defendant Roy McKittrick has filed with him certificates stating that discriminatory laws are found to exist in the State of Indiana or the Commonwealth of Pennsylvania, and stating that forty-five (45) days from the date of publication of said notice it will be unlawful to import or transport into the State of Missouri or to purchase, receive, possess or sell in the State of Missouri any alcoholic liquor manufactured in the State of Indiana or the Commonwealth of Pennsylvania. The giving and publication of said notice by the defendant Thomas F. Fitzgerald will occur before due notice of this proceeding could be given or a hearing had thereon and plaintiffs would thereby immediately suffer an irreparable loss, injury and damage to their business in the State of Missouri.

4. Therefore, defendants, and each of them, their respective deputies, appointees, assistants and employees, their successors, and each of them, are hereby temporarily restrained from in any way or manner enforcing against this plaintiff, or others similarly situated, the Discrimination Act (Sections 4525 h-1 to 4525 h-6, Revised Statutes of Missouri, 1929, as amended by the Laws of 1937), and that defendant Thomas F. Fitzgerald, his appointees, assistants, employees and successors in office, and each of them, be enjoined from giving the notice or notices referred to in any newspaper or newspapers any such notice or notices, [fols. 3-4] and from publishing that, or notifying any licensees in the State of Missouri that the State of Indiana or the Commonwealth of Pennsylvania are states in which there are "discriminatory laws" within the meaning of said term as defined in said Discrimination Act, upon the giving of security by plaintiffs in the sum of One Thousand ($1,000.00) Dollars, (which sum the Court deems proper), conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained hereby, and now plaintiffs tender such security, and same is by the Court approved.

5. Plaintiffs' application for an interlocutory injunction is hereby set down for hearing on the 7th day of December, 1937. Service of a copy of this temporary restraining order upon the Governor of the State of Missouri and the

defendants, at least five (5) days prior to such hearing shall constitute sufficient notice.

6. This temporary restraining order shall remain in force only until the hearing and determination of plaintiffs' application for an interlocutory injunction upon notice as aforesaid.

Dated this 20th day of October, 1937, at Jefferson City, Mo. at 11:20 A. M.

(Signed) J. C. Collet, Judge.

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[fol. 5] IN UNITED STATES DISTRICT COURT

NOTICE TO GOVERNOR OF MISSOURI—Filed January 10, 1937

To Honorable Lloyd C. Stark, Governor of the State of Missouri:

You are Hereby Notified that each of the above named plaintiffs, in each of the above entitled causes, will, on the 10th day of January, 1938, at the opening of Court, or as soon thereafter as counsel can be heard, present to a three-judge Court sitting in the Federal Court rooms at Kansas City, Jackson County, Missouri, their applications in each of the above entitled causes for an interlocutory injunction suspending and restraining the enforcement, operation and execution of a certain statute of the State of Missouri, known and designated as "House Bill No. 331, Regular Session of the General Assembly of the State of Missouri," Statutes of 1937 (Sections 4525 h-1 to 4525 h-6, inclusive, Revised Statutes of Missouri, 1929, as amended by the Laws of Missouri, 1937, page 536), which said statute is referred to as the "Liquor Discrimination Act". Said applications for interlocutory injunctions, if granted, will suspend and restrain the enforcement, operation and execution of said "Liquor Discrimination Act" by restraining the action of the Attorney General of the State of Missouri and the Supervisor of Liquor Control of the State of Missouri in the enforcement and execution of said statute. You are

further notified that said applications have been set down for hearing by the Court at the time and place mentioned.

(Signed) James P. Aylward, George V. Aylward,
[fol. 6] Terence M. O'Brien, Attorneys for Plaintiffs in Each of the Above Entitled Causes.

Due service of above notice acknowledged, this 12th day of November, 1937.

(Signed) Lloyd C. Stark, Governor of the State of Missouri.

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[fol. 7] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO AMEND BILL OF COMPLAINT—
Filed January 10, 1938

Upon this 8th day of January, 1938, plaintiffs filed their application for leave to amend their bill of complaint by interlineation, and same came on for hearing; plaintiffs appearing by their attorneys, James P. Aylward, George V. Aylward and Terence M. O'Brien, and the defendants appearing by their attorney, Edward H. Miller, Assistant Attorney General of the State of Missouri, and consenting to the granting of such leave. And the Court, having examined the application, heard and considered the statements of counsel and the consent of defendants, and being fully advised in the premises, finds that in the furtherance of justice plaintiffs' application should be sustained and plaintiffs should be granted leave of Court to amend their bill of complaint by interlineation as set out and prayed in their application;

And it is so Ordered.

J. C. Collet, Judge.

Approved: James P. Aylward, George V. Aylward, Terence M. O'Brien, Attorneys for Plaintiffs.

Approved: Roy McKittrick, Atty. Gen.; Edward H. Miller, Attorneys for Defendants.

[fol. 8] IN UNITED STATES DISTRICT COURT FOR THE CENTRAL DIVISION OF THE WESTERN DISTRICT OF MISSOURI

In Equity. No. 668

JOSEPH S. FINCH AND COMPANY, A CORPORATION; THE OLD QUAKER COMPANY, a Corporation, and Schenley Distributors, Inc., a Corporation, Plaintiffs,

vs.

ROY MCKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, and Thomas F. Fitzgerald, Supervisor of Liquor Control of the State of Missouri, Defendants

BILL OF COMPLAINT—Filed October 20, 1937

Plaintiffs for their cause of action in equity against defendants allege:

I

(a) Plaintiff Joseph S. Finch and Company (hereinafter referred to as "plaintiff Finch") is and for the past several years has been a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and is a citizen and resident of the Commonwealth of Pennsylvania.

(b) Plaintiff The Old Quaker Company (hereinafter referred to as "plaintiff Quaker") is and for the past several years has been a corporation duly organized and existing [fol. 9] under and by virtue of the laws of the State of Maryland, and is a citizen and resident of the State of Maryland.

(c) Plaintiff Schenley Distributors, Inc., (hereinafter referred to as "plaintiff Distributors") is and for the past several years has been a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of the State of New York.

(d) Defendant Roy McKittrick is the duly elected, qualified and acting Attorney General of the State of Missouri, and is the principal legal officer of said State charged with the enforcement of the laws of said State, and particularly a certain statute known and designated as "House Bill No.

331, Regular Session of the General Assembly of the State of Missouri, Statutes of 1931", (Sec. 4525h-1 to 4525h-6, inclusive, Revised Statutes of Missouri, 1929, as amended by the Laws of Missouri, 1937, page 536, et seq.) which statute is hereinafter referred to as the "Discrimination Act". Said "Discrimination Act" expressly confers specific powers and duties upon said defendant Roy McKittrick. Said defendant McKittrick is now and at all the times hereinafter mentioned has been a citizen and resident of Jefferson City, Cole County, Missouri, and a citizen and resident of the Western District of Missouri. The acts and threatened acts of said defendant McKittrick, as hereinafter set out, constitute an unlawful trespass upon and an unlawful invasion of plaintiffs' rights and property and an unlawful confiscation of plaintiffs' property.

[fol. 10] (e) Defendant Thomas F. Fitzgerald is now and since October 1, 1937, has been the duly appointed, qualified and acting Supervisor of Liquor Control of the State of Missouri, and as such is charged with the administration of the liquor laws of the State of Missouri. Said "Discrimination Act" confers specific powers and duties upon said defendant. Said defendant Fitzgerald is now and at all the times hereinafter mentioned has been a citizen and resident of Jefferson City, Cole County, Missouri, and a citizen and resident of the Western District of Missouri. The acts and threatened acts of said defendant Fitzgerald, as hereinafter set out, constitute an unlawful trespass upon and an unlawful invasion of plaintiffs' rights and property, and an unlawful confiscation of plaintiffs' property.

II

The jurisdiction of this Court depends upon the following facts: This is a suit of a civil nature in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars, in that the right of plaintiff Finch to continue to manufacture alcoholic liquors in the Commonwealth of Pennsylvania and to have same transported to and imported into the State of Missouri and sold and delivered to purchasers in the State of Missouri is of a value vastly in excess of Three Thousand ($3,000.00) Dollars, and in [fol. 11] that plaintiff Finch's business, good will and going concern value in the State of Missouri are worth vastly

in excess of Three Thousand ($3,000.00) Dollars, and in that, except for the matters and things hereinafter complained of, plaintiff Finch could and would continue the manufacture for sale and distribution in the State of Missouri of large amounts of alcoholic liquors manufactured by plaintiff Finch in the Commonwealth of Pennsylvania, the profits to plaintiff Finch from the sale of which would greatly exceed the sum of Three Thousand ($3,000.00) Dollars, and in that plaintiff Finch's right to have defendants restrained from enforcing said "Discrimination Act" against plaintiff Finch is of a value vastly in excess of Three Thousand ($3,000.00) Dollars, and in that the value of plaintiff Finch's business and good will in the State of Missouri, which will be destroyed if the enforcement of said "Discrimination Act" against said plaintiff is not enjoined, is vastly in excess of Three Thousand ($3,000.00) Dollars, and in that the enforcement of said "Discrimination Act" against plaintiff Finch will damage plaintiff Finch's property vastly in excess of the sum of Three Thousand ($3,000.00) Dollars, and in that the right of plaintiff Quaker to continue to manufacture alcoholic liquors in the State of Indiana and have same transported into and sold in the State of Missouri is of a value vastly in excess of Three Thousand ($3,000.00) Dollars, and in that plaintiff Quaker's business, good will and going concern value in the State of Missouri are worth vastly in excess of Three Thousand ($3,000.00) Dollars, and in that, except for the matters and things hereinafter complained of, plaintiff Quaker could and would continue the manufac- [fol. 12] ture for sale and distribution in the State of Missouri of large amounts of alcoholic liquors manufactured by plaintiff Quaker in the State of Indiana, the profits to plaintiff from the sale of which would greatly exceed the sum of Three Thousand ($3,000.00) Dollars, and in that the value of the alcoholic liquors which plaintiff Finch has heretofore manufactured in the Commonwealth of Pennsylvania and which plaintiff Quaker has heretofore manufactured in the State of Indiana, and which plaintiff Distributors has transported to and sold in the State of Missouri was in excess of the sum of Two Million ($2,000,000.00) Dollars, and the net income from the sales thereof exceeded the sum of Three Thousand ($3,000.00) Dollars, and in the plaintiff Quaker's right to have defendants restrained from enforcing said "Discrimination Act", against plaintiff Quaker, is of a value vastly in excess of Three Thousand ($3,000.00)

Dollars, and in that the value of plaintiff Quaker's business and good will in the State of Missouri, which will be destroyed if the enforcement of said "Discrimination Act" against plaintiff Quaker is not enjoined, is vastly in excess of Three Thousand ($3,000.00) Dollars, and in that the enforcement of said "Discrimination Act" against plaintiff Quaker will damage plaintiff Quaker's property vastly in excess of the sum of Three Thousand ($3,000.00) Dollars, and in that the right of plaintiff Distributors to continue to buy alcoholic liquors manufactured by plaintiff Finch in the Commonwealth of Pennsylvania and to transport same and sell same in the State of Missouri is of a value [fol. 13] vastly in excess of Three Thousand ($3,000.00) Dollars, and in that the right of plaintiff Distributors to continue to buy alcoholic liquors manufactured by plaintiff Quaker in the State of Indiana and to transport and sell same in the State of Missouri is of a value vastly in excess of Three Thousand ($3,000.00) Dollars, and in that plaintiff Distributors' business, good will and going concern value in the State of Missouri are worth vastly in excess of Three Thousand ($3,000.00) Dollars, and in that, except for the matters and things hereinafter complained of, plaintiff Distributors could and would continue to import into the State of Missouri large amounts of alcoholic liquors manufactured by plaintiff Finch in the Commonwealth of Pennsylvania and by plaintiff Quaker in the State of Indiana, the profits from the sale of which would greatly exceed the sum of Three Thousand ($3,000.00) Dollars, and in that plaintiff Distributors' right to have defendants restrained from enforcing said "Discrimination Act" against plaintiff Distributors is of a value vastly in excess of Three Thousand ($3,000.00) Dollars, and in that the value of plaintiff Distributors' business and good will in the State of Missouri, which will be destroyed if the enforcement of said "Discrimination Act" against plaintiff Distributors is not enforced, is greatly in excess of Three Thousand ($3,000.00) Dollars, and in that the enforcement of said "Discrimination Act" against plaintiff Distributors will damage plaintiff Distributors' property vastly in excess of the sum of [fol. 14] Three Thousand ($3,000.00) Dollars, and that said controversy arises under the Constitution of the United States, as hereinafter set out, and is wholly between citizens of different States, as aforesaid.

III

(a) Plaintiff Finch now owns and operates, and for the past several years has owned and operated, a distillery and rectifying plant and establishment in the Commonwealth of Pennsylvania, at which location it manufactures and has manufactured alcoholic liquors, including gins and whiskeys. Plaintiff Quaker owns and operates, and for the past several years has owned and operated, a distilling and rectifying plant and establishment in the State of Indiana, at which location it manufactures and has manufactured alcoholic liquors, including gins and whiskeys. Plaintiff Distributors has sold and is now selling in various parts of the United States where such sales are lawful, including the state of Missouri, alcoholic liquors manufactured by plaintiff Finch at said distillery and rectifying establishment in the Commonwealth of Pennsylvania and by plaintiff Quaker at said distillery and rectifying establishment in the State of Indiana. In the State of Missouri the sales by plaintiff Distributors of said alcoholic liquors have been made under and by virtue of a non-resident permit, duly issued by the Supervisor of Liquor Control of the State of Missouri, and plaintiff Distributors now is the lawful owner and holder of such [fol. 15] non-resident permit. By reason of the quality of their products, the expenditure of a vast amount of money in advertising and solicitation in the State of Missouri, and the expenditure of a vast amount of time and effort in soliciting and in developing a distribution system, plaintiffs have built up and developed in the State of Missouri a great and extensive demand for their products, and a valuable good will and a valuable sales and distribution system, and plaintiffs have contracts with numerous employes, and others, who are engaged in the manufacture of their products in the Commonwealth of Pennsylvania and in the State of Indiana, respectively, and the transportation, distribution and sale of same in the State of Missouri.

(b) The aforesaid "Discrimination Act" was enacted by the General Assembly of the State of Missouri and thereafter approved by the Governor of Missouri on or about the 8th day of April, 1937, and according to its terms, said "Discrimination Act" is now in full force and effect. Said "Discrimination Act" provides that defendant McKittrick, the Attorney General of the State of Missouri, shall examine

the laws, rules and regulations in force in the other States of the United States pertaining to the sale and distribution of alcoholic liquors to determine whether said laws, rules or regulations discriminate against alcoholic liquors manu- [fol. 16] factured in the State of Missouri, and said "Discrimination Act" directs said defendant McKittrick to file with the defendant Fitzgerald, Supervisor of Liquor Control of the State of Missouri, a certificate as to each State in which discriminatory laws are found to exist. Said "Discrimination Act" directs said defendant Fitzgerald, as Supervisor of Liquor Control, upon the filing of such certificate or certificates, to forthwith give notice by publication to all holders of licenses authorizing the sale of alcoholic liquors of the filing of said certificates, listing therein the States in which discriminatory laws have been found to exist, and stating that forty-five (45) days from the date of the publication of said notice it will be unlawful to import or transport into the State of Missouri, or to purchase, receive, possess or sell any alcoholic liquor manufactured in a State named in any of said certificates, which notice, according to the terms of said "Discrimination Act", shall be given by publication in some newspaper of general circulation in the State of Missouri, and by forthwith mailing to each of the holders of licenses authorizing the sale of liquors at wholesale in the State of Missouri a notice containing the same information as that contained in the published notice and giving the name of the newspaper in which the notice is published. Said "Discrimination Act" further provides that forty-five (45) days after such publication and the giving of such notice, the transportation or importation into the State of Missouri or the purchase, sale, receipt or possession [fol. 17] in the State of Missouri of any alcoholic liquor manufactured in a State which has been found to have discriminatory laws, rules or regulations, shall be unlawful. Under the liquor laws of the State of Missouri, including said "Discrimination Act", it is further provided that the Supervisor of Liquor Control, defendant Fitzgerald, may revoke any license previously granted to sell alcoholic liquors in the State of Missouri for a violation of said "Discrimination Act", and said "Discrimination Act" further provides that a decision revoking a license for such violation shall be final and no right to review or appeal therefrom shall exist. Under the liquor laws of the State of Missouri any person who shall sell, transport or purchase alcoholic

liquors without a license is guilty of a felony and subject to imprisonment from two (2) to five (5) years in a State penitentiary, and from three (3) to twelve (12) months in a county jail, or a fine of from One Hundred ($100.00) Dollars to One Thousand ($1,000.00) Dollars, or both such fine and imprisonment. The liquor laws of the State of Missouri further provide that any place wherein intoxicating liquor is sold or kept for sale in violation of the laws of the State of Missouri constitutes a nuisance and said laws provide for the maintenance of injunction proceedings to enjoin such use. The liquor laws of the State of Missouri further subject real estate upon which such a nuisance is maintained to a lien to pay all fines and costs assessed against the occupant of such property.

[fol. 18] Which said "Discrimination Act" is in words and figures as follows:

"4525h-1. Definitions

For the purpose of this Act, unless the context otherwise requires, the words and phrases herein defined are used in this Act in the sense given them in the following definitions:

(1) The phrase 'Alcoholic liquor' means and includes all liquors referred to in Section 2 of an Act of the 57th General Assembly, Extra Session, approved January 13, 1934, Laws of Missouri, Extra Session, 1933-34, page 78, and any amendments thereto, and also all non-intoxicating beer as defined in Section 13139-a of an Act of the 57th General Assembly, Regular Session, approved March 15, 1933, Laws of Missouri, 1933, page 257, and any amendments thereto.

(2) The word 'manufacturer' means every brewer, fermenter, distiller, rectifier, wine maker, blender, processor, bottler, or person who fills or refills an original package, and others engaged in brewing, fermenting, distilling, rectifying, or bottling alcoholic liquor as above defined.

(3) The word 'manufacture' means to distill, rectify, ferment, brew, make, mix, concoct, process, blend, bottle, or fill an original package with any alcoholic liquor.

(4) The term 'licensee' means any person holding a valid license issued by the Supervisor of Liquor Control under

the authority given by the Liquor Control Act passed by the 57th General Assembly, Extra Session, approved January 13, 1934, Laws of Missouri, Extra Session, 1933-34, [fol. 19] page 77, and any amendments thereto, and also any person holding a valid license issued by the Supervisor of Liquor Control under the provisions of Article 9 of Chapter 93, Revised Statutes of Missouri, 1929, as amended by the 57th General Assembly, approved March 15, 1933, Laws of Missouri, 1933, page 256, and any amendments thereto.

(5) The phrase 'Attorney General' means the Attorney General of this state, or any of his regularly appointed Assistants Attorney General whom he may designate to perform his duties under this act.

(6) The phrase 'Supervisor of Liquor Control' means the Supervisor of Liquor Control appointed under Section 2 of an Act of the 57th General Assembly, Extra Session, approved January 13, 1934, Laws of Missouri, Extra Session, 1933-34, page 78, and any amendments thereto, or any of his regularly appointed assistants whom he may designate to perform his duties under this act.

(7) The phrase 'discriminatory laws' means the laws of any state, or the rules or regulations of any administrative officer, commission, or body thereof, which

(a) impose any tax, impost, or license fee upon the right to transport or import into such state any alcoholic liquor manufactured in this state; or

(b) prohibit the importation, transportation, or sale of any alcoholic liquor manufactured in this State unless the manufacturer obtains a license or pays a tax or fee when such manufacturer neither imports nor transports such [fol. 20] liquor into said state nor sells the same therein; or

(c) prohibit or restrict any licensee in said state from purchasing, or from importing or transporting into said state, Alcoholic liquor for the purpose of sale at wholesale therein from any manufacturer or whosesaler in this state, if such licensee may lawfully purchase the same kind of alcoholic liquor for the purpose of resale at wholesale therein from a manufacturer in said state without such restrictions or prohibition; or

(d) impose any different warehousing requirements or higher warehousing fees or inspection fees upon any alcoholic liquor manufactured in this State and imported or transported into such state than is imposed upon the same kind of alcoholic liquor manufactured in such state; or

(e) prohibit any manufacturer or wholesaler in this State or the agents or representatives of either from exercising the privilege of soliciting orders for the sale of alcoholic liquor manufactured in this State to any licensed wholesaler in said State, if the sale is to be made outside thereof, or to any retailer if such orders are to be filled therein by or through a licensed wholesaler in said State, if licensed manufacturers or wholesalers of the same kind of alcoholic liquor in said State or the agents or representatives of either are authorized to solicit orders for the sale of such alcoholic liquor manufactured in said State to licensed wholesalers or retailers; or requires manufacturers or [fol. 21] wholesalers in this State, or the agents or representatives of either, to secure a license or pay a fee for said privilege, if no additional license or further fee is required of licensed manufacturers or wholesalers in said State for the privilege of soliciting orders from wholesalers or retailers; or impose upon a manufacturer or wholesaler in this State, or upon the agents or representatives of either, a higher fee for the privilege of soliciting orders for the sale of alcoholic liquors manufactured in this State than is imposed upon any person therein for the sole privilege of soliciting orders for the sale of the same kind of alcoholic liquor manufactured in said state; or

(f) impose any higher fees or taxes upon alcoholic liquor manufactured in this state when imported, transported, or sold therein than is imposed upon the same kind of alcoholic liquor manufactured and sold within said state; or

(g) impose any higher fee for the privilege of selling or handling any alcoholic liquor manufactured in this state than is imposed for the privilege of handling or selling the same kind of alcoholic liquor manufactured within said state; or

(h) impose any prohibition against or limitations, restrictions, or condition upon the purchase, sale, or solicitation of orders for the sale of alcoholic liquor manufactured within this state, or upon any person purchasing, soliciting orders for the sale, or selling the same that is not imposed

upon the same kind of alcoholic liquor manufactured within [fol. 22] such state, or upon persons purchasing, selling, or soliciting orders for the sale of the same; or

(i) impose, directly or indirectly, any other prohibition, restrictions, or condition, upon the receipt, possession, disposition, or transportation of alcoholic liquor manufactured in this state, which is not equally imposed upon the same kind of alcoholic liquor manufactured in said state, and in such manner as to place the alcoholic liquor manufactured in this state at a disadvantage in competition therein with the same kind of alcoholic liquor manufactured in said state. Provided, however, that the phrase 'discriminatory laws', as above defined, shall not be deemed to include any requirement by law, rule or regulation of any state for (1) the furnishing of a bond by an importer or person first in possession of alcoholic liquor within such state, if the bond as required does not exceed the sum of $5,000 or in any event the amount of the bond required of any licensed manufacturer of the same kind of alcoholic liquor within such state, or (2) the making of reports as to the kind and quantity of liquor received or sold by such person, or (3) the obtaining of a separate license authorising only importation if no fee is required to be paid therefor, and if such license may be obtained by any person authorized to sell at wholesale, upon application therefor; and provided, further, that in order to secure said importer's license it shall not be required of any corporation applying therefor that any percentage of its stockholders or directors or officers be citizens or residents of said state; [fol. 23] or (4) the limiting of the right to import or transport into said state to those who are duly licensed to sell such liquors at wholesale.

(8) The phrase 'state in which discrimination exists' means any state of the United States as to which the Attorney General finds and certifies, as herein provided, that discriminatory laws exist, and so long as the certificate remains effective any state so certified by him shall be a 'state in which discrimination exists'. (Laws 1937, p. 536, Sec. 1.)

### 4525h-2. Discrimination by Other States—Duty of Attorney General

It shall be the duty of the Attorney General of this state to examine laws, rules and regulations in force in the sev-

eral states pertaining to the purchase, sale, transportation, importation, warehousing, inspection, receipt, and solicitation for sale of alcoholic liquor, to determine whether any discriminatory laws, as defined herein, exist, and he shall, within thirty (30) days after the effective date of this Act, prepare and file with the Supervisor of Liquor Control, a separate certificate as to each state in which discriminatory laws, as herein defined, are found to exist. In determining whether discriminatory laws exist, such determination shall be made irrespective of whether alcoholic liquor manufactured in this state is actually sold in or transported or imported into the state, the laws of which are under examination. Upon the filing with the Attorney General by any interested party [fol. 24] of a written complaint alleging that discriminatory laws exist in any state as to which no certificate has been filed, it shall be the further duty of the Attorney General to re-examine the laws, rules and regulations of the state named in such complaint, and, if he then finds that discriminatory laws exist in such state, he shall file his certificate within thirty (30) days after the filing of such complaint. Each certificate shall be signed by the Attorney General and shall recite that an examination has been made of the laws, rules and regulations in force in the state therein named, and that on the date said examination was completed, which date shall be specified, it is found that discriminatory laws exist in the state named therein. In such finding the Attorney General shall set out verbatim the parts or sections of such of the laws, rules and regulations which he finds to be discriminatory, and on any petition for review of or appeal from such finding, a rebuttable presumption shall exist that there are in force in such state laws, rules and regulations in the form and language as contained in such finding. Such presumption may be overcome by a duly certified and authenticated copy of the laws, rules and regulations of the state in question which shows them to be other or different from that contained in the finding of the Attorney General. Upon the filing of such certificate or certificates, the Supervisor of Liquor Control shall forthwith give notice by publication, to all holders of licenses authorizing the sale of any alcoholic liquors of the filing of said certificate listing therein the states in [fol. 25] which discriminatory laws are found to exist and stating that after forty-five (45) days from the date of the publication of said notice it will be unlawful to import or

transport into this state, or to purchase, receive, possess or sell any alcoholic liquor manufactured in a state named in any of said certificates, which notice shall be given by one publication in some newspaper of general circulation in this state. In addition thereto a notice containing the same information and giving the name of the newspaper in which the notice above provided is to be published shall be forthwith mailed to each of the holders of licenses authorising the sale of alcoholic liquors at wholesale, directed to such licensees at the address of the premises designated in said license. Upon the mailing of said notice there shall be attached to the original thereof to be filed in the office of the liquor commission an affidavit of the fact of mailing by the person so mailing, which notice with affidavit attached shall be competent proof in any proceeding under this act of the fact of the giving of said notice on the date of the mailing thereof. Any licensee or person interested may within fifteen (15) days from the date of said publication and the mailing of said notice file written application with the Attorney General for a review of any finding in respect to the laws, rules or regulations of the state named in any of said certificates. Upon any application for review of any such finding being filed, the Attorney General shall fix a time for hearing to be held upon all applications filed within said fifteen (15) day period, such hearing to be had [fol. 26] within twenty-five (25) days from the date of said publication, and, upon such hearing being had, the Attorney General shall, within thirty (30) days from the date of said publication if he finds no discriminatory laws do in fact exist in said state, file a certificate cancelling his certificate theretofore filed. But, unless such certificate of cancellation shall be so filed, the certificate theretofore filed shall remain in full force and effect. Any licensee or person interested may at any time file with the Attorney General an application for the cancellation of any certificate then on file upon the ground that discriminatory laws no longer exist in the state named therein, and it shall be the duty of the Attorney General to forthwith fix a time for hearing to be held thereon, and after the hearing, the Attorney General shall, within thirty (30) days after the date of the filing of said application if he finds that the laws of said state no longer discriminate, file a certificate cancelling the certificate theretofore filed. Any failure of the attorney

general to make a finding upon an application or complaint which may be filed under the provisions hereof, shall be deemed as a finding adverse to the complainant or applicant, and appeal may be taken therefrom as in Section 3 provided. It shall be the duty of the Attorney General, at any time he is satisfied that in any state discriminatory laws no [fol. 27] longer exist, to file his certificate cancelling the certificate of discrimination as to such state. It shall also be the duty of the Attorney General, whenever he shall determine that any state not named in any certificate theretofore filed shall have enacted discriminatory laws, forthwith to file his certificate for each state wherein such laws are by him found to have been enacted. Notice of additional certificates filed by the Attorney General shall be given in the same manner as herein provided with respect to the filing of the original certificates. After forty-five (45) days from the date of the publication and mailing of notice, as herein provided, and so long as it remains in force, such certificate shall establish conclusively that discriminatory laws exist in the state named and that the transporting or importing into this state, or the purchase, receipt, possession, or sale within this state of alcoholic liquor manufactured in such named state is a violation of Section 4 hereof. (Laws 1937, p. 536, Sec. 2.)

4525h-3. Appeal from Findings of Attorney General—Procedure

Any licensee or person interested, who has filed application for review or an application for cancellation of a certificate, and any complainant, who has filed complaint alleging the existence of discriminatory laws in any state under the [fol. 28] provisions of Section 2 hereof, may appeal from an adverse finding of the Attorney General with respect to said application or complaint to the Circuit Court of Cole County, by serving notice of appeal upon the Attorney General and filing with the Clerk of said Court a petition setting forth the finding appealed from and the grounds of such appeal, such notice to be served and said petition filed within fifteen (15) days after the last day on which the Attorney General is required by Section 2 hereof to make a finding with respect to the application or complaint from which appeal is taken. The Attorney General shall,

within ten (10) days after service of notice of appeal, file his answer attaching thereto a copy of the record of the proceedings had before him. If more than one appeal is taken from any particular finding, all subsequent appeals shall be consolidated with the one first taken and all such appeals shall be heard as one cause. Upon the trial of such appeal, the only question for determination shall be whether the Attorney General acted illegally or in excess of authority in making the finding from which the appeal is taken. The cause shall be tried by said court, or a judge thereof, at the earliest possible date, and the finding of such court or judge shall be final and no appeal shall lie therefrom. If upon trial the court or judge adjudges that the finding of the Attorney General is illegal or in excess of authority, such finding shall be annulled and a copy of such order shall be filed by the Clerk of said Court with the Supervisor [fol. 29] of Liquor Control, and the Attorney General shall file his further certificate in conformity with such order. Upon an appeal by a complainant who has alleged the existence of the discriminatory laws in any state, and as to whose complaint the Attorney General has found adversely, if the Court finds in favor of the appellant, a mandatory order shall enter requiring the Attorney General to forthwith file his certificate in conformity to such order. (Laws 1937, p. 536, Sec. 3.)

4525h-4. Importation of Alcoholic Liquor from State in Which Discrimination Exists Prohibited.

The transportation or importation into this state, or the purchase, sale, receipt, or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined: Provided, however, that

(a) As to alcoholic liquor manufactured in any state as to which the Attorney General certifies that discriminatory laws exist, where no appeal is taken from his finding, the prohibition of this section shall become effective forty-five (45) days after the publication of the notice provided in Section 2 hereof;

[fol. 30] (b) As to alcoholic liquor manufactured in any state as to which the Attorney General certifies that discriminatory laws exist and an appeal is taken from his finding, the prohibition of this section shall become effective thirty (30) days after the order or judgment of the court or judge, if such finding is affirmed. (Laws 1937, p. 536, Sec. 4.)

4525h-5. Licenses Previously Issued, Effect on

Any license heretofore issued by the Supervisor of Liquor Control under the authority given by the Liquor Control Act passed by the 57th General Assembly, Extra Session, approved January 13, 1934, Laws of Missouri, Extra Session, 1933-34, page 77, and any amendments thereto, or under the provisions of Article 9 of Chapter 93, Revised Statutes of Missouri, 1929, as amended by the 57th General Assembly, approved March 15, 1933, Laws of Missouri, 1933, page 256, and any amendments thereto, shall be deemed to have written therein, and any license issued hereafter under or pursuant to said statutes, shall have written therein the following: 'This license shall not authorize the holder hereof to receive, purchase, possess, or sell any alcoholic liquor manufactured in a "state in which discrimination exists" as defined by the laws of this state, and the holder hereof is prohibited from receiving, purchasing, possessing, or selling any such liquor.' (Laws 1937, p. 536, Sec. 5.)

4525h-6. Revocation of Licenses

The revocation by the Supervisor of Liquor Control of [fol. 31] any license issued under the Liquor Control Act passed by the 57th General Assembly, Extra Session, approved January 13, 1934, Laws of Missouri, Extra Session, 1933-34, page 77, and any amendments thereto, or under the provisions of Article 9 of Chapter 93, Revised Statutes of Missouri, 1929, as amended by the 57th General Assembly, approved March 15, 1933, Laws of Missouri, 1933, page 256, and any amendments thereto, shall, ipso facto, revoke any license issued to said licensee by the proper authority designated by the County Court of any county, or the corresponding authority in the City of St. Louis. The decision of the Supervisor of Liquor Control in revoking any license issued by him for a violation of the provisions of Section 4

hereof shall be final and no right to review or appeal therefrom shall exist. (Laws 1937, p. 536, Sec. 6.)"

[fol. 32] (c) Purporting to act under the supposed authority of said "Discrimination Act", defendant McKittrick has determined that certain of the laws, rules and regulations in force in the Commonwealth of Pennsylvania and in the State of Indiana are discriminatory laws as defined by said "Discrimination Act" and has prepared and filed with defendant Fitzgerald a certificate certifying that said laws, rules and regulations in force in the Commonwealth of Pennsylvania and the State of Indiana are discriminatory within the meaning of said "Discrimination Act". Upon information and belief, defendant Fitzgerald, purporting to act pursuant to the supposed authority of said "Discrimination Act" is forthwith about to give and unless restrained by the order of this Court will forthwith give notice by publication in a newspaper of general circulation in the State of Missouri to all holders of licenses authorizing the sale of any alcoholic liquors in the State of Missouri of the fact that the defendant McKittrick has filed with said defendant Fitzgerald, as required by said "Discrimination Act", a certificate stating that discriminatory laws have been found to exist in the Commonwealth of Pennsylvania and in the State of Indiana, and stating that forty-five (45) days subsequent to the date of said publication of said notice, it will be unlawful to import or trans-[fol. 33] port into the State of Missouri or to purchase, receive, possess or sell in the State of Missouri any alcoholic liquors manufactured in the Commonwealth of Pennsylvania or in the State of Indiana; defendant Fitzgerald is further about to forthwith give and unless restrained by an order of this Court will forthwith give a written notice by mail to each holder of a license authorizing the sale of alcoholic liquors at wholesale within the State of Missouri, in which written notice said defendant Fitzgerald will give the same information contained in the aforesaid newspaper notice and state the name of the newspaper in which said notice will be published; and said defendants, and each of them, unless restrained and enjoined by this Court from so doing will forthwith commence the prosecution of numerous criminal and civil actions against these plaintiffs, their employes and agents, and their customers, and others, to enforce said "Discrimination Act", and will forthwith

otherwise enforce against the plaintiffs and others each and all of the provisions of said "Discrimination Act"; which said certificates are in words and figures, respectively, as follows:

[fol. 34] "This is to certify that we have this 6th day of October, 1937, in compliance with House Bill No. 331 enacted by the 59th General Assembly and found at pages 536 to 543, inclusive, Laws of Missouri, 1937, completed an examination of the laws, rules and regulations pertaining to the purchase, sale, transportation, importation, warehousing, inspection, receipt, and solicitation for sale of alcoholic liquor, of the State of Indiana; and we further certify that the following provisions of the laws, rules and regulations of said state are discriminatory within the meaning of House Bill No. 331, supra, in the particulars hereinafter set out:

"The Alcoholic Beverages Act of 1935 (House Bill No. 399) Chapter 226 of the Acts of the Indiana General Assembly of 1935 as amended by (Senate Bill No. 118) Chapter 197 of the Acts of the Indiana General Assembly of 1937 embodied in the June, 1937 Supplement to Burns Annotated Indiana Statutes, 1933, provides as follows (House Bill 399, Laws of 1935, page 1092):

"Sec. 9. Class "A"—* * *

"Such wholesaler's permit, however, shall not be issued unless and until there be paid by said wholesaler to said administrator a separate license fee therefor of one thousand dollars ($1,000), in cash and there also be filed with the application for a permit a surety bond in the penal sum of two thousand dollars ($2,000), payable to the State of Indiana, to be approved by the commission, conditioned that he will not violate any of the provisions of any law of this state, touching the business carried on by such wholesaler, and that he will not violate any of the rules and regulations of the commission, provided that fifty dollars ($50.00), and no more, may be recovered in any one action by the State of Indiana, against such wholesaler on said bond, for the violation of a rule or regulation of the commission, and no more than one hundred dollars ($100), [fol. 35] may be recovered in any one action by the State of Indiana on said bond, for the violation of any of the provisions of this act, (violations prior to action instituted to be deemed one continuing violation), but, no action or

actions shall be brought upon said bond, except by the State of Indiana, and for the use and benefit of the State of Indiana. (Par. 6.)

* * * * * * *

(Pages 1093-1095:)

"After November 15, 1935, any person holding a permit to wholesale alcoholic malt beverages under this act may (1) by complying with the terms and conditions hereinafter prescribed, apply for and may be granted by the commission, an additional permit to be known as a 'port of entry permit,' which shall, when granted, authorize such wholesaler so applying, to import into the State of Indiana, alcoholic malt beverages which have been manufactured outside of the State of Indiana, and to transport, possess, sell and deliver, such imported alcoholic malt beverages within any county in the State of Indiana, but he may store and keep such imported malt beverages only in the county in which he is authorized to store and keep alcoholic malt beverages under his wholesaler's permit. Such importations, transportation, possession, sale and delivery shall be subject to the rules and regulations of the commission and subject to the same restrictions provided in this act, for persons holding permits to manufacture within the State of Indiana. No holder of a wholesaler's permit shall be qualified for such said additional permit who is disqualified to hold a wholesaler's permit. No such additional permit to import alcoholic malt beverages, however, shall be issued to any wholesaler, unless and until such wholesaler shall have paid a separate additional annual license fee in the sum of fifteen hundred dollars ($1,500) to said administrator and shall have made such a showing as the commission shall require with reference to the ownership and residence and/or ownership of the business and/or stock of such corporation, and, unless and until said wholesaler shall have filed an additional surety bond in the penal sum of ten thousand dollars ($10,000), conditioned that he will not violate any of the provisions of any law of this state, touching the alcoholic traffic or the manufacture, importation, transportation or possession or sale or delivery of alcoholic malt beverages as defined in this act, and/or of the rules and regulations of the commission applicable thereto, and

[fol. 36] that he will account for and pay over all license fees levied under this act, on the products imported and sold or withdrawn for sale by him under such permit, provided that the sum of one hundred dollars ($100), and no more, may be recovered in any one action on said bond, by the State of Indiana against such wholesaler, for the violation of a rule or regulation of the commission or for the violation of any of the provisions of this act (violations prior to action instituted to be deemed one continuing violation), but the full amount of any and all said taxes and license fees due and owing may be recovered by the State of Indiana in any action on said bond. No action or actions shall be brought upon said bond, except by the State of Indiana, and for the use and benefit of the State of Indiana. A beer wholesaler's permit and/or said additional permit as a 'port of entry permit' granted to such wholesaler shall continue for one (1) year only, including the day of issue, and, thereafter, such permit or permits may be issued to the same prior holder thereof or to another applicant therefor, but only in the same manner and upon the same terms and conditions above specified and upon the payment of said special license fees. Not fewer than ten or more than one hundred port of entry permits shall be granted by the commission. (Par. 9.)

(Section 40 (a), pp. 1174-1175:)

"Sec. 40 (a) Alcoholic Malt Beverage License Fees (gallonage). Any authorized manufacturer and/or importing agent, and/or wholesaler invested with the importing privileges (as to imported alcoholic malt beverages), and/or the holder of a dining car permit or of a boat permit, shall pay unto the State of Indiana a license fee of three and one-third (3⅓¢) cents on each gallon of alcoholic malt beverages manufactured or given or sold or withdrawn for sale or gift by him in the State of Indiana, which license fee shall be paid on the first and fifteenth day of each month, on all such beverages so manufactured or sold or given away or withdrawn for sale or gift by him during the preceding half-monthly period. * * * Said license fee is hereby levied in addition to any and all license fees which may have been paid by him at the time of, or as a condition to the granting of any permit, * * *

Bulletin No. 2, Alcoholic Beverage Commision (Indiana), issued November 13, 1935, provides:

[fol. 37] "Each holder of a Port of Entry Permit is hereby required to purchase and keep to supply his trade a minimum of one brand of beer from each of five out of state breweries, which brands shall be handled by him without prejudice in promoting the sale of the same. Any unfair treatment of any one of said brands of five beers shall be construed by the Alcoholic Beverage Commission as an evasion of the provisions of the Alcoholic Beverages Act of 1935, prohibiting non-residents and foreign corporations from owning or controlling ports of entry permittees or the business thereof." (Last paragraph.)

That portion of paragraph 6 of Section 9, Acts of Indiana, supra, which requires a wholesaler to pay a license fee in order to be authorized to import into the State of Indiana alcoholic malt beverages which have been manufactured outside of the State of Indiana, is a discriminatory law within the meaning of Section 1, subsection (7), subdivision (a), of House Bill No. 331, Laws of Missouri, 1937, page 537.

The provision of Section 9, and more particularly that portion of paragraph 6, Acts of Indiana, supra, which provides that a wholesaler of alcoholic malt beverages manufactured within the State of Indiana must pay a $1000 license fee, while it is provided by a portion of paragraph 9, supra, that a wholesaler authorized to import alcoholic malt beverages must pay a $1500 license fee, is discriminatory law within the meaning of Section 1, subsection (7), subdivisions (f), (g) and (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

The provisions of Section 9, Acts of Indiana, supra, and more particularly that portion of paragraph 6, supra, which provides for the recovery of $50.00, and no more, for the violation of any of the provisions of this act by a wholesaler of alcoholic malt beverages of domestic manufacture [fol. 38] while a portion of paragraph 9, supra, provides for a recovery of $100.00, and no more, for the violation of any of the provisions of this Act by a wholesaler of alcoholic malt beverages manufactured outside of the State, are discriminatory within the meaning of Section 1, subsection

(7), subdivision (i), of House Bill No. 331, Laws of Missouri, 1937, page 538.

That portion of paragraph 9, Section 9, Acts of Indiana, supra, which limits the number of Port of Entry permit holders, is a discriminatory law within the meaning of Section 1, subsection (7), subdivision (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

The provisions of Section 40, Acts of Indiana, supra, which imposes a gallonage tax upon duly authorized importers who sell or otherwise dispose of within the State of Indiana alcoholic malt beverages manufactured outside of the State, are discriminatory within the meaning of Section 1, subsection (7), subdivisions (f), (g), and (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

The last paragraph of Bulletin No. 2, supra, issued November 13, 1935, is discriminatory law within the definition of Section 1, subsection (7), subdivision (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

Respectfully submitted, (Signed) Roy McKittrick, Attorney-General; (Signed) Aubrey R. Hammett, Jr., Assistant Attorney-General.

[fol. 39] "This is to certify that we have this 6th day of October, 1937, in compliance with House Bill No. 331 enacted by the 59th General Assembly and found at pages 536 to 543, inclusive, Laws of Missouri, 19[illegible], completed an examination of the laws, rules and regulations pertaining to the purchase, sale, transportation, importation, warehousing, inspection, receipt, and solicitation for sale of alcoholic liquor, of the State of Pennsylvania: and we further certify that the following provisions of the laws, rules and regulations of said state are discriminatory within the meaning of House Bill No. 331, supra, in the particulars hereinafter set out:

The Pennsylvania Liquor Laws, as amended, embodied in Title 47, Purdon's Pennsylvania Statutes, 1936 Compact Edition, as amended, (based upon and identical with Purdon's Pennsylvania Statutes Annotated, Permanent Edition) provide as follows:

'Sec. 100b. License fees; distribution of revenue. No license shall be issued to any manufacturer, distributor, importing distributor or retail dispenser until the licensee

shall have first paid an annnual license fee for such grant as follows:

* * * * * * *

'(b) In case of a distributor, the license fee shall be four hundred ($400.00) dollars, * * *.

Se-. 744-415. The board may, upon application, grant to [fol. 40] responsible persons of good reputation importers' licenses, such licenses shall permit the holders thereof to bring or import liquor from other states, foreign countries, peninsular possessions of the United States, and obtain tax paid liquor from manufacturers located within the commonwealth to be sold outside of this commonwealth and exclusively to Pennsylvania liquor stores within this commonwealth.

'The fee for such licenses shall be $100.00 per annum, and, before any such license shall be granted, the applicant shall file with the board a bond in the sum of $10,000.00, conditioned for the faithful observance by the licensee of all of the laws of this commonwealth and the regulations of the board relating to the distribution, sale, and use of liquor, malt or brewed beverages, alcohol or other alcoholic beverages.

'Sec. 747. Imposition of Tax. (a) * * * every manufacturer shall be subject to pay to the Commonwealth of Pennsylvania the taxes imposed in this section for the privilege of producing, manufacturing, distilling, rectifying or compounding distilled spirits, rectified spirits or wines in this Commonwealth. * * * (Par. 1.)

'Such Taxes * * * shall be computed thereon at the following rates: (Par. 2.)

* * * * * * *

'On rectified spirits, thirty cents ($.30) per proof gallon, or wine gallon when below proof, * * * in addition to the tax imposed herein on the privilege of manufacturing, or producing, using or selling within the Commonwealth the distilled spirits or wines from which said rectified spirits are produced, manufactured or compounded. (Par. 4.)

'(b) * * * every importer shall be subject to pay to the Commonwealth of Pennsylvania the taxes imposed in

this section for the privilege of selling or using in this Commonwealth distilled spirits, rectified spirits, or wines [fol. 41] brought into this Commonwealth. Such taxes * * * shall be computed thereon at the following rates: (Par. 7.)

* * * * * * *

'On rectified spirits, one dollar and thirty cents ($1.30) per proof gallon or wine gallon when below proof, * * * (Par. 9).'

Regulation No. 51, Promulgated July 25, 1935, Pennsylvania Liquor Control Board, provides as follows:

'Sec. 1. Except as hereinafter provided, every person holding a Malt Liquor Distributor's License issued by the respective County Treasurers of this Commonwealth shall, not later than August 10, 1935, file with the Pennsylvania Liquor Control Board an application for a Malt of Brewed Beverage Distributor's or Importing Distributor's License on forms furnished by the Board, together with a surety bond in the amount of One Thousand ($1,000.00) Dollars in case of Distributor and in case of an Importing Distributor in the amount of Two Thousand ($2,000.00) Dollars, an application fee of Ten ($10.00) dollars and a license fee calculated from July 1, 1935 at the rate of Thirty-three and 33/100 ($33.33) Dollars in the case of a Distributor and in the case of an Importing Distributor at the rate of Seventy-five ($75.00) Dollars for each month the license will be in force in the particular license district fixed by the Board, in which the Distributor's or Importing Distributor's place of business is located, less a credit for the used portion of the fee paid by the Distributor to the County Treasurer for such license calculated on a monthly basis from July 1, 1935.'

Section 100b, Pennsylvania Liquor Laws, supra, and Regulation No. 51, supra, which provide for a payment of a $400.00 license fee for a distributor and a $900.00 license fee for an importing distributor, are discriminatory within [fol. 42] the terms of Section 1, subsection (7), subdivisions (f), (g) and (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

Section 744-415, Pennsylvania Liquor Laws, supra, insofar as it imposes a license fee upon the right to import

alcoholic beverages, is discriminatory within the meaning of Section 1, subsection (7), subdivision (a), of House Bill No. 331, Laws of Missouri, 1937, page 537.

Section 747, Pennsylvania Liquor Laws, supra, insofar as it imposes a thirty cents gallonage tax on rectified spirits of domestic manufacture while it imposes a $1.30 tax on imported rectified spirits, is discriminatory law within one meaning of Section 1, subsection (7), subdivisions (f), (g) and (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

Respectfully submitted, (Signed) Roy McKittrick, Attorney General; (Signed) Aubrey B. Hammett, Jr., Assistant Attorney General."

[fol. 43] There are numerous persons, firms and corporations, citizens of Missouri and other states, who are manufacturers, in Missouri, of alcoholic liquor within the meaning of the 'Discrimination Act.'

The plants in Missouri where malt alcoholic liquors, within the meaning of said Act, are manufactured, represent a large permanent investment, produce large quantities of said malt alcoholic liquors, employ many employees, operate, in many cases, with substantial profits, and constitute one of the most important industries carried on within the State of Missouri. Said malt alcoholic liquors so manufactured in Missouri are well known and sold in large quantities throughout the United States, including the states mentioned herein, and by reason of the quality of the same, the expenditure of a vast amount of money in advertising and solicitation in said states, and the expenditure therein of a vast amount of time and effort in soliciting and in developing a distribution system thereof, said Missouri manufacturers have built up and developed in said states a great and extensive demand for their said malt alcoholic liquors and valuable good will and sales and distribution systems for the same.

There are in Missouri only six distilleries, with a total combined capacity of approximately seventy-five barrels of alcoholic liquor per day, and their present production could only supply a small fraction of the present demand for distilled spirits within the State of Missouri. Some of said distilled liquor so manufactured in Missouri is sold in other states.

[fol. 44] There is in Missouri one plant in which alcoholic liquor within the meaning of said Act, commonly called champagne, is manufactured. Said champagne is manufactured in said plant in large quantities, is well known, and sold in large quantities throughout the United States, including the states mentioned herein, and by reason of the quality of the same, the expenditure of a large amount of money in advertising and solicitation in said states, and the expenditure therein of a large amount of time and effort in soliciting and in developing a distribution system thereof, the manufacturers of said champagne have built up and developed in said states an extensive demand for their product, and valuable good will and sales and distribution systems.

There are several small plants in Missouri where fermented alcoholic liquor, within the meaning of said Act, commonly called wine, is produced from grapes.

There are several large plants in Missouri, with large volumes of sales, in which fermented alcoholic liquors, commonly known as wine, are fortified or blended, and are bottled and placed in original packages. Some of said wines are sold outside the State of Missouri.

There are in Missouri several large plants in which spirituous alcoholic liquors, within the meaning of said 'Discrimination Act', including the kind mentioned in this petition, are rectified, mixed, blended, bottled and placed in original packages. The majority of the whiskey which is so rectified, is manufactured outside the State of Missouri. The usual process by which the corporations owning said plants prepare their products for sale is by purchasing whiskey or other spirituous liquors in bulk, reducing the proof thereof by the addition of distilled water, sometimes blending different whiskeys or other spirituous liquors by [fol. 45] mixing same, and bottling the product for sale in original packages. The plants in Missouri where said alcoholic liquors are handled as in this paragraph described, represent a substantial permanent investment, and large quantities of alcoholic liquors so handled therein are sold both in this state and in other states.

The phrase 'alcoholic liquor' as defined by Section 2 of an Act of the 57th General Assembly, Extra Session, ap-

proved January 17, 1934, Laws of Missouri, Extra Session 1933-1934, pages 78-79, is defined as follows :

'Section 2. * * * The Supervisor of Liquor Control shall issue licenses for the manufacture and sale of ardent spirits, malt, vinous, fermented and every class of liquors used as beverages and having an alcoholic content in excess of three and two-tenths (3.2) per cent by weight.'

Section 17 of said Act, Laws of Missouri, Extra Session 1933-34, page 83, is as follows:

'Definition of 'intoxicating liquor'.—The term 'intoxicating liquor' as used in this act, shall mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations or mixtures for beverage purposes, containing in excess of three and two-tenths (3.2) per cent of alcohol by weight.'

Section 1 of an act relating to the manufacture and sale of malt beverages for export and sale outside the State, Laws of Missouri, Extra Session, 1933-34, page 95, is as follows:

'*Legalising malt beverages containing 5 per cent alcohol.*—From and after the effective date of this act it shall be lawful for any person, partnership or corporation engaged in the brewing or manufacture of beer or other malt liquors made from pure hops, or pure extract of hops, or pure barley malt, or other wholesome grains, to manufacture in the State of Missouri, such beverage to be exported from this State and sold outside of the State. Such beverage to contain alcohol in excess of 3.2 per cent by weight, but not in excess of 5 per cent by weight.'

Section 1 of an Act relating to the manufacture and sale of beverages containing in excess of 3.2 per cent for sale outside of State. Laws of Missouri, Extra Session, 1933-34, page 96, is as follows:

'Legalising manufacture and sale.—From and after the effective date of this act it shall be lawful for any person, [fol. 46] partnership or corporation engaged in the manufacture, and/or wholesale selling and distributing of beverage liquors containing alcohol in excess of 3.2 per cent, to

manufacture in the State of Missouri and/or to export such beverage liquors outside of this State to be sold outside of the State.'

"Section 13139-A of an Act of the 57th General Assembly, Regular Session, approved March 15, 1933, Laws of Missouri, 1933, page 257, defining non-intoxicating beer, is as follows:

*'Legalising manufacture, sale and transportation—prescribing alcoholic content.*—Beer having an alcoholic content of not less than one-half of one per cent by volume not exceeding 3.2 per cent by weight, is hereby declared to be non-intoxicating beer, and may be lawfully manufactured and sold, or sold, in this State by any holder of a permit issued by the Food and Drug Commissioner of this State, authorizing such manufacture, and sale, or sale, and may be lawfully transported, sold and consumed in this state, and may be lawfully shipped into, or out of, this state subject to such inspection fees, and/or taxes, and under such regulations as may be provided by law, * * *'.

"Plaintiffs have complied with all laws of the State of Missouri relative to foreign corporations doing business within said State, except the Discrimination Act here in controversy, and have also complied with all other laws of the State of Missouri, except the Discrimination Act here in controversy, and with all of the laws of the United States of America, concerning their right to manufacture alcoholic liquors, and in pursuance of their permits and licenses to engage in and transact business within the State of Missouri, the plaintiffs have been engaged therein for the past several years, which said business is a property right within Section 1 of Article XIV of the Amendment to the Constitution of the United States, which provides:

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"Said Missouri 'Discrimination Act' is unconstitutional and void under Sec. 1, of Article XIV, Amendments of the

Constitution of the United States, because it classifies manufacturers, brewers, fermenters, distillers, rectifiers, wine makers, blenders, processors, bottlers, or persons who fill or refill an original package, and others engaged in brewing, fermenting, distilling, rectifying, or bottling alcoholic liquor, into one group or classification, and then in effect divides the classification into various unreasonable, arbitrary and unnatural distinctions and groups, namely: [fol. 47]

(a) Those persons, firms or corporations domiciled, incorporated and manufacturing alcoholic liquors in foreign states for sale and importation into Missouri and other states, in which no 'discrimination' has been found or certified by the Attorney-General to exist, the same being the States of Illinois, Maryland, Kentucky and many other states;

(b) Those persons, firms or corporations domiciled, incorporated and manufacturing alcoholic liquors in foreign states for sale and importation into Missouri and other states, in which state 'discrimination' has been found and certified by the Attorney General to exist;

(c) Those persons, firms and corporations domiciled, incorporated and manufacturing alcoholic liquors in foreign states for sale and importation into Missouri and other states, in which 'discrimination' has been found and certified by the Attorney General to exist, whether the alcoholic liquor manufactured in said 'discriminatory' state is actually sold in competition with alcoholic products and commodities manufactured in Missouri:

(d) Those persons, firms and corporations domiciled, incorporated and manufacturing alcoholic liquors in foreign states for sale and importation into Missouri and other states, engaged in selling non-intoxicating liquors and beers in the State of Missouri, and in foreign states, who import and transport same into Missouri without any regulation or restraint, because no 'discrimination' has been certified to exist within their respective states; and those transporting and importing the same commodities of equal quantity from states in which said 'discrimination' has been found and certified by the Attorney General to exist.

[fol. 48] (e) Those who sell only alcoholic liquors manufactured in Missouri are not adversely affected by said 'Dis-

crimination Act' while those who import liquor from Pennsylvania and Indiana and other states of equal quality cannot sell it within the State of Missouri because the Attorney General has certified that such states have discriminatory laws;

(f) Those persons, firms or corporations domiciled in the State of Missouri owning liquors manufactured or distilled in states in which 'discrimination' has been found to exist, and now having same for sale in the State of Missouri, or engaged in selling in the State of Missouri alcoholic liquors produced, manufactured or distilled in states in which 'discrimination' has been found to exist;

(g) Those persons, firms or corporations domiciled in the State of Missouri, who own intoxicating liquor manufactured, produced or distilled in states in which no 'discrimination' has been found to exist.

"Under Section 1 of Amendment to Article XIV of the Constitution of the United States, which provides that no state 'shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law', plaintiffs are entitled in Missouri to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances, and that since the 'Discrimination Act' in question discriminates between those defined as manufacturers, under Section 2 thereof, located within the State of Missouri, and those foreign manufacturers located without the State of Missouri, but who are permitted to import free from the effect of said 'Discrimination Act' alcoholic beverages into the State of Missouri, and because no 'discrimination' has been certified or found by the Attorney General of the State of Missouri to exist within their respective states, namely the states of Illinois, Maryland and Kentucky, and other states, and with those located [fol. 49] without the State but who are not permitted to import alcoholic liquors into the State of Missouri because the Attorney General has found and certified that 'discrimination' exists within their respective states. Said 'Discrimination Act' does not have any real, substantial or reasonable relation to the regulation or control of the liquor traffic within the State of Missouri; that the same does not have

any real, substantial, natural or necessary relation to the promotion of the public health, safety, morals, good order, or general public welfare, since the alcoholic liquors manufactured by plaintiffs are of the same kind, quality, purity and goodness as those manufactured within the State of Missouri, and those which are now being imported free from restraint of such 'Discrimination Act' from other states into the State of Missouri, by manufacturers in Illinois, Maryland, and Kentucky and other states engaged in the same business as plaintiffs, and therefore the classification distinction and discrimination between manufacturers of alcoholic liquors as herein set forth, and as provided in said 'Discrimination Act' forbidding, prohibiting and excluding imports of like kind of manufacturers engaged in the same business, is not justified or warranted by any real and substantial difference, having a reasonable relation to the subject of said legislation, and since the classification as to manufacturers all of whom are similarly situated, with respect to liquor products and commodities manufactured, imported and sold by them, the division thereof into separate and distinct classes, although under said Act they are classified as one single group, is unreasonable, unlawful, arbitrary, artificial, evasive, oppressive, capricious and discriminatory both as to persons within and without the jurisdiction of the State of Missouri, and as to persons without said State engaged in manufacture thereof, and as to lawful alcoholic commodities, products and merchandise produced outside of said State, similar in every respect as to kind, quality, purity and goodness, and which are entitled under the equal protection clause of Section 1, Article XIV of the Amend-
[fol. 50] ments to the Constitution of the United States, to be used, delivered and imported into and sold within the State of Missouri, and thereby said Missouri 'Discrimination Act' imposes unreasonable burdens, restraints and liabilities upon plaintiffs and others which are not cast upon other similarly situated, in violation of said Section 1, Article XIV of the Amendments to the Constitution of the United States.

Said Missouri 'Discrimination Act' is in conflict with, contrary to and violates Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides:

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

in that the same fails to apply equally to persons or corporations within the State of Missouri, and to persons and corporations domiciled in foreign states, but lawfully authorized to transact business within the State of Missouri, all of whom are similarly situated and engaged in similar business and occupations; and in that the same confiscates and destroys the property, business and liberty of contract of plaintiffs and others similarly situated without due process of law as guaranteed thereby; and since the plaintiffs have no power or control over the legislative department of the Commonwealth of Pennsylvania and the State of Indiana, or other such states, with respect to the enactment, policy or repeal of their laws, and because the Legislative Department of the State of Missouri has attempted to and has by said 'Discrimination Act' exercised extra-territorial legislative powers and jurisdiction over the Commonwealth of Pennsylvania and the State of Indiana, and other states by prescribing conditions with reference to control of liquor traffic in Pennsylvania, Indiana and other states, and as to the use, sale, delivery and importation of liquor products from the Commonwealth of Pennsylvania and the State of Indiana and other states into the State of Missouri, it is [fol. 51] obviously impossible for said plaintiffs to comply with the provisions of the Missouri 'Discrimination Act', and hence the same is unlawful, unreasonable, capricious, arbitrary, oppressive and discriminatory as to plaintiff.

"The Missouri 'Discrimination Act' is unconstitutional and void under the first section of the XIV Amendment to the Constitution of the United States, which provides:

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

because the discrimination prohibiting, forbidding and excluding Indiana and Commonwealth of Pennsylvania alcoholic products and commodities from importation, delivery and use in the State of Missouri is effective, even though the alleged discriminatory laws of the Commonwealth of Pennsylvania, Indiana and sister states are lawful and reasonable, and do not exclude, forbid or prohibit the importation, use and delivery of alcoholic products and commodities manufactured in Missouri and other states into the Commonwealth of Pennsylvania and State of Indiana.

"The 'Discrimination Act' of Missouri also contravenes, conflicts with and violates said Section 1 of the XIV Amendment to the Constitution of the United States, which provides:

'All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

because the unlawful, unreasonable and arbitrary discrimination prescribed thereby between citizens of Missouri and citizens of the Commonwealth of Pennsylvania, State of Indiana, and other such states, and between the alcoholic products and commodities manufactured by them in the [fol. 52] Commonwealth of Pennsylvania, State of Indiana and other such states, and all others engaged in the liquor industry, and between liquor commodities of similar and equal quality and purity, is of such character and is burdened with such conditions as will prevent and prohibit altogether the importation, use, delivery or introduction into Missouri by Pennsylvania and Indiana manufacturers and dealers of alcoholic liquors and those of other such states of the same kind, quality and purity, as that produced in Missouri."

There are many citizens of the State of Missouri whose livelihood now depends on employment in Missouri in the various stages of the manufacture of alcoholic liquors within the meaning of the Discrimination Act.

The Missouri Liquor Licenses of plaintiffs which were in force at the time of the filing of the petition herein, bear on the fact thereof an expiration date of September 6, 1938.

Plaintiffs have not been admitted as foreign corporations to do business in the State of Missouri and are not registered with the Secretary of State of Missouri as foreign corporations licensed to do business in the State of Missouri. Plaintiffs do no intrastate business in Missouri.

(d) There are numerous other states in the United States, including Illinois, Maryland, and Kentucky, which have not been certified by defendant McKittrick as having laws, rules and regulations discriminating against intoxicating liquor manufactured in the State of Missouri and in which said States there are numerous persons and corporations engaged [fol. 53] in the manufacture of intoxicating liquors who sell their products throughout the United States wherever such sale is lawful, including the State of Missouri. Said manufacturers will be free to continue to import and sell within the State of Missouri such alcoholic liquors, including gins and whiskeys, which said products have been and are now in competition with those manufactured and sold by plaintiffs within the State of Missouri.

(e) Said "Discrimination Act" is in violation of the Constitution of the United States and therefore invalid and void for the following reasons:

(First.) Said "Discrimination Act" violates Section 8 of Article I of the Constitution of the United States, which, among other things, provides: "The Congress shall have the power * * * to regulate commerce * * * among the several States * * *", because said "Discrimination Act" is an attempt by the State of Missouri to regulate and prohibit interstate commerce and constitutes an undue burden on interstate commerce, and because the State of Missouri has, by said "Discrimination Act", usurped the power of the Federal Congress over interstate commerce, and because said "Discrimination Act" is not uniform in its operation upon interstate commerce, and because said "Discrimination Act" provides that the importation into or receipt, possession or sale in Missouri of alcoholic beverages manufactured in Pennsylvania or in Indiana is prohibited, while the importation into and sale in Missouri of alcoholic liquors manufactured in other States, such as Illinois, Kentucky and [fol. 54] Maryland, is permitted by said "Discrimination Act", and because said "Discrimination Act" arbitrarily makes classifications without any reasonable or justifiable basis therefor, as herein set out, and because said "Dis-

crimination Act" is an unreasonable exercise of the police power, since said "Discrimination Act" is not designed to promote any purpose of or to protect public health, morals, welfare or safety. The Twenty-First Amendment to the Constitution of the United States, which among other things provides, "The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited", was intended only to protect those States which prohibit or restrict the manufacture, sale, use and possession of intoxicating liquors, and was not intended to take from the Federal Congress jurisdiction over interstate commerce in intoxicating liquors between such States as have by their laws made intoxicating liquor a lawful commodity.

(Second.) Said "Discrimination Act" violates Section 10 of Article I of the Constitution of the United States, which, among other things, provides: "No State shall * * * pass any ex post facto law or law impairing the obligation of contracts", in that said "Discrimination Act" makes the possession of alcoholic liquors lawfully acquired and possessed unlawful and is retroactive in its operation upon such alcoholic liquors, and in that said "Discrimination Act" impairs the obligation of plaintiffs' contracts with their employes and agents respecting the importation into and sale of plaintiffs' products in the State of Missouri, since said "Discrimination Act" renders performance of such contracts as ap-
[fol. 55] plied to the State of Missouri illegal.

(Third.) Said "Discrimination Act" violates Section 2 of Article IV of the Constitution of the United States, which, among other things, provides: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States", because said "Discrimination Act" and its operation deny to the plaintiff Finch as a citizen and resident of the Commonwealth of Pennsylvania, and to the plaintiff Quaker as a citizen and resident of the State of Maryland, and to the plaintiff Distributors as a citizen and resident of the State of New York, the privileges and immunities which are enjoyed in the State of Missouri by citizens of other States, such as the States of Illinois, Kentucky, Maryland, and because said "Discrimination Act" thereby constitutes legislation which discriminates against plaintiffs, in violation of their constitutional rights,

and because said "Discrimination Act" creates and constitutes classes and distinctions without any reasonable or justifiable basis therefor, as herein set out, and because the purpose of said "Discrimination Act" is not to promote any purpose of public health, morals, welfare or safety in the State of Missouri, but is designed and calculated to retaliate against citizens of those States wherein laws discriminating against alcoholic liquors manufactured in Missouri have been passed.

(Fourth.) Said "Discrimination Act" violates the Fourteenth Amendment to the Constitution of the United States, which, among other things, provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law", in that the passage and enforcement of said "Discrimination Act" against plaintiffs will destroy plaintiffs' business in Missouri, as aforesaid, and [fol. 56] thereby deprive plaintiffs of their property without due process of law, and thereby confiscate plaintiffs' property in Missouri. Said "Discrimination Act" does not constitute due process of law because said "Discrimination Act" is not general in its operation, but operates only against the importation of alcoholic liquors and only against the importation of alcoholic liquors from States certified by the Attorney General of the State of Missouri as having laws, rules or regulations discriminating against alcoholic products produced in the State of Missouri, and because said "Discrimination Act" constitutes class legislation, as herein set out, and because said "Discrimination Act" destroys plaintiffs' rights to make contracts without any reasonable basis, and because said "Discrimination Act" destroys plaintiffs' rights to enforce contracts already made without any reasonable basis, and because said "Discrimination Act" deprives plaintiffs of their right to acquire and possess property, and because said "Discrimination Act" makes unreasonable classifications, and because said "Discrimination Act" makes possession or sale of merchandise, previously lawful to possess and sell, unlawful, and because said "Discrimination Act" confiscates and destroys plaintiffs' property by legislative enactment, and because said "Discrimination Act" makes any place in Missouri where alcoholic liquors manufactured in Pennsylvania or Indiana

are received, possessed or sold, a nuisance, whereas such [fol. 57] places do not and will not constitute nuisances as a matter of fact, and because said "Discrimination Act" confiscates and destroys plaintiffs' property and rights without a trial or a hearing and without employing any method of judicial procedure, and because said "Discrimination Act" makes importation into the State of Missouri and possession in the State of Missouri of plaintiffs' products unlawful, regardless of intent, and because said "Discrimination Act" delegates judicial powers to the Attorney General of the State of Missouri, who is not a judicial officer, and because said "Discrimination Act" authorizes the Attorney General of the State of Missouri to make findings of fact and law which operate upon plaintiffs' rights and plaintiffs' property without giving any previous notice to plaintiffs, and without extending to plaintiffs the opportunity of a hearing, and because said "Discrimination Act" delegates legislative powers to the Attorney General of the State of Missouri and the Supervisor of Liquor Control of the State of Missouri, neither of whom are legislative officers, and because said "Discrimination Act" delegates the legislative power of the State of Missouri to the law-making bodies of the several other States of the United States, since the law-making bodies of such other States can, by passing or repealing laws in such other States, make acts in the State of Missouri lawful or unlawful, and because said "Discrimination Act" infringes and usurps the sovereign power of the several other States of the United States to construe and interpret their own laws, rules and [fol. 58] regulations and to determine the validity and effect of the same, and because said "Discrimination Act" creates classifications between citizens and residents of the State of Missouri offering for sale, receiving or possessing alcoholic liquors manufactured in the Commonwealth of Pennsylvania or in the State of Indiana, and other citizens and residents of the State of Missouri offering for sale, receiving or possessing alcoholic liquors manufactured in other States, such as Illinois, Maryland and Kentucky, and because said "Discrimination Act" takes and confiscates plaintiffs' property in the State of Missouri without any compensation to plaintiffs.

(Fifth.) Said "Discrimination Act" violates the Fourteenth Amendment to the Constitution of the United States,

which provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws", in that said "Discrimination Act" constitutes a law which abridges the privileges and immunities of plaintiff Finch as a citizen of the United States and of the Commonwealth of Pennsylvania, of plaintiff Quaker as a citizen of the United States and of the State of Maryland, of plaintiff Distributors as a citizen of the United States and of the State of New York, in this, that said "Discrimi-
[fol. 59] nation Act" abridges and destroys the rights of said plaintiffs to continue to conduct their business of manufacturing alcoholic liquors in the Commonwealth of Pennsylvania and in the State of Indiana and transporting same into the State of Missouri for sale and use in said State, which said right, privilege and immunity is possessed by citizens of other States, such as the States of Illinois, Maryland and Kentucky, and in this, that said "Discrimination Act" deprives plaintiffs of their property without due process of law for the reasons aforesaid, and in that said "Discrimination Act" denies to plaintiffs the equal protection of the laws, in that it creates unreasonable classifications and distinctions as aforesaid, and in that said "Discrimination Act" creates a special privilege, right, immunity and benefit for the citizens of such other States as Illinois, Maryland and Kentucky, who are engaged in the manufacture of alcoholic liquors in such other States and the transportation of such alcoholic liquors into the State of Missouri for the purpose of sale and distribution in the State of Missouri.

(f) In the Commonwealth of Pennsylvania and in the State of Indiana there are numerous other manufacturers [fol. 60] in alcoholic liquors who are in a situation similar to that of plaintiffs, and plaintiffs bring this action on behalf of such others so similarly situated, as well as themselves, and the granting of an injunction by this Court against the enforcement of said "Discrimination Act" will prevent a multiplicity of suits and prosecutions which will

otherwise arise in connection with the enforcement of said Act.

(g) Defendants, and each of them, unless restrained and enjoined by this Court from so doing, will enforce against plaintiffs, and others, each and all the provisions of said "Discrimination Act" and cause the plaintiffs great and irreparable damage and injury and result in the complete destruction and loss of plaintiffs' business in the State of Missouri.

[fol. 61] IV

(a) Plaintiffs have no adequate remedy at law and unless plaintiffs are afforded the protection which only a court of equity can afford, plaintiffs will be exposed to a multiplicity of suits, complaints and prosecutions, and will lose their customers in the State of Missouri, due to the fact that such persons as are now handling alcoholic liquors manufactured by plaintiffs for sale in the State of Missouri will cease handling plaintiffs' products because of fear of prosecution, and plaintiffs' good will in the State of Missouri will be destroyed, and plaintiffs' reputation and credit in the State of Missouri will be destroyed, and plaintiffs' reputation and credit elsewhere will be damaged, and plaintiffs' distribution system in the State of Missouri will be destroyed, and plaintiffs' reputation will be damaged by reason of the institution of prosecutions and complaints, even if same are terminated favorably to plaintiffs, and the demand in the State of Missouri for alcoholic liquors manufactured by plaintiff Finch in the Commonwealth of Pennsylvania, and by plaintiff Quaker in the State of Indiana will immediately be destroyed and no further purchases of said alcoholic liquors will be made by purchasers for resale within the State of Missouri, and plaintiffs will suffer injuries, damage and losses which would not be subject to accurate and correct computation [fol. 62] and would not be recoverable from any persons responsible therefor, and which damages could not be recompensed by money, and plaintiffs will be compelled to submit to trespasses and invasions of the rights guaranteed to plaintiffs under the before mentioned provisions of the Constitution of the United States.

(b) In order to protect plaintiffs' rights and property in the premises, a temporary restraining order should be

issued immediately, restraining defendant Fitzgerald from publishing and giving the notice aforementioned and restraining defendants from otherwise enforcing said "Discrimination Act", because the giving and publication of said notice by the defendant Fitzgerald and the enforcement of said "Discrimination Act" otherwise by defendants will occur before due notice of this proceeding could be given or a hearing had thereon, and plaintiffs will thereby immediately suffer the irreparable loss, injury and damage aforesaid.

Wherefore, plaintiffs pray:

1. That writs of subpoena be issued, directed to defendants herein, requiring them to appear and make full, true and complete answer to this bill of complaint, but not under oath (answers under oath being expressly waived), and to abide by and perform such orders and decrees as the Court may make in the premises.

[fol. 63] 2. That the said "Discrimination Act" be declared, adjudged and decreed to be void because contrary to the rights of plaintiffs under the Constitution of the United States, as hereinabove set forth.

3. That the defendants, and each of them, their respective appointees, assistants and employes and successors, and each of them, be enjoined from in any way or manner enforcing against these plaintiffs and other- similarly situated the provisions of the said "Discrimination Act" or any part or parts thereof.

4. That inasmuch as the plaintiffs have no adequate remedy at law, and to the end that plaintiffs may not suffer an immediate, great and irreparable loss, the plaintiffs pray that defendant Thomas F. Fitzgerald, his appointees, assistants and employes and successors, and each of them, be enjoined from giving the notice or notices specified to be given by him by Section 2 of said "Discrimination Act" and from publishing in a newspaper or newspapers the name of the Commonwealth of Pennsylvania and of the State of Indiana as States which have been found by the defendant Roy McKittrick to have discriminatory laws, rules and regulations within the meaning of said "Discrimination Act"; and until the hearing and determination of the application for an interlocutory injunction as aforesaid, this

[fol. 64] Honorable Court issue its temporary restraining order restraining said defendants, their respective appointees, assistants and employes from in any manner enforcing or attempting to enforce against these plaintiffs any of the provisions of the said "Discrimination Act"; and that upon the final hearing of this cause said interlocutory injunction be made permanent.

5. For such other and further relief as in the premises may be just.

James P. Aylward, George V. Aylward, Terence M. O'Brien, Attorneys for Plaintiffs.

[fol. 65] *Duly sworn to by Ralph T. Heymsfeld. Jurat omitted in printing.*

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[fol. 66] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed December 10, 1938

Come now defendants and move the Court to dismiss the bill of complaint herein for the reason and upon the ground that said bill of complaint fails to state facts sufficient to constitute a valid cause of action in equity, or to entitle plaintiffs to the relief in equity therein sought.

Roy McKittrick, Attorney General of the State of Missouri, (Signed) Roy McKittrick, Edward H. Miller, Assistant Attorneys General, Solicitors for Defendants.

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[fol. 67] IN UNITED STATES DISTRICT COURT

ORDER EMPANELLING THREE-JUDGE COURT—October 20, 1937

Upon the application of plaintiffs in the above entitled cause, presented for a temporary restraining order to the Honorable J. C. Collet, Judge of the United States District Court, and it having been decided that a three-judge Court should be empanelled, pursuant to Section 266 of the Judicial Code (as amended), the Honorable J. W. Woodrough, Circuit Judge, the Honorable Merrill E. Otis, District Judge and the Honorable J. C. Collet, District Judge, are hereby designated to hear and determine said application.

[fol. 68] IN UNITED STATES DISTRICT COURT

STIPULATION CONSOLIDATING CAUSES, ETC.—Filed January 8, 1938

It Is Hereby Stipulated by and between the plaintiffs in each of the above entitled causes and the defendants in each of the above entitled causes, as follows:

First. Inasmuch as each of the above are causes of a like nature and relate to the same questions, these cases may be consolidated for all purposes, including hearing, consideration, decision, determination and review.

Second. At the same time the Court hears and determines the application for an interlocutory injunction, it shall also finally hear and determine these causes, and enter its final decree.

(Signed) James P. Aylward, George V. Aylward, Terence M. O'Brien, Attorneys for Plaintiffs in each of the Above-entitled Causes. (Signed) Roy McKittrick, Edward H. Miller, Attorneys for Defendants in Each of the Above-Entitled Causes.

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[fol. 69] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—January 10, 1938

The above entitled cause being submitted to the Court upon plaintiffs' application for interlocutory and permanent injunction and defendants' motion to dismiss bill of complaint, and the Court having heard the arguments of counsel and having examined the pleadings, said matters are taken under advisement by the Court and the parties hereby ordered to submit their briefs.

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[fol. 70] IN UNITED STATES DISTRICT COURT

DECREE—Filed March 16, 1938

These causes having come on for hearing as a consolidated cause, pursuant to stipulation of the parties that said causes should be consolidated for all purposes including hearing,

consideration, decision, determination and review, on January 10, 1938, before the Honorable J. W. Woodrough, United States Circuit Judge, the Honorable Merrill E. Otis, District Judge of the Western District of Missouri, Central Division, and the Honorable John C. Collet, District Judge for the State of Missouri, sitting in said Western District of Missouri, Central Division, sitting as a three judge District Court, duly convened pursuant to the provisions of Section 266, as amended, of the United States Judicial Code, on the several petitions of plaintiffs praying for a temporary and permanent injunction against the defendants from enforcing the provisions of an act of the Legislature of Missouri, contained at pages 536 to 543, both inclusive, of the Laws of Missouri, 1938, being an act entitled "'An Act prohibiting licensees from transporting or importing into this state, purchasing, receiving, possessing and selling intoxicating liquor and non-intoxicating beer manufactured or bottled in any state, the laws, rules or regulations of which discriminate against intoxicating liquor or non-intoxicating beer manufactured in this state or against those selling or dealing therein, defining discriminatory laws and prescribing the duties of the Attorney General with [fol. 71] respect to determining the existence of the discriminations and providing for an appeal from his finding; prescribing the duties of the Supervisor of Liquor Control with respect to the enforcement of this act and providing for the revocation of licenses for a violation of this act'', and defendant's motions to dismiss said petitions, and the causes having been duly heard and submitted as a consolidated cause before said three-judge court on said motions to dismiss said petitions and the argument of counsel thereon, and on the stipuations of the respective parties that said several causes should be taken as submitted, and finally heard and determined, and final decree entered therein, upon the pleadings as aforesaid, and the Court now being fully advised in the premises it is

Ordered, Adjudged and Decreed, That said Act of the Legislature of Missouri, contained on pages 536 to 543, both inclusive, of the Laws of Missouri, 1937, heretofore in this decree particularly designated, does not violate the provisions of the Commerce Clause of the Constitution of the United States contained in Section 8, Article I thereof, or the Equal Protection Clause of said Constitution contained in Section 1 of the Fourteenth Amendment thereto.

It Is Further Ordered, Adjudged and Decreed that the temporary restraining orders heretofore issued in the several constitutent clauses be, and the same hereby are, dissolved.

It Is Further Ordered, Adjudged and Decreed that the applications for a temporary injunction and for a permanent injunction in each of the constituent causes be, and the same hereby are, denied.

It Is Further Ordered, Adjudged and Decreed that the defendants' motion to dismiss the petitions in each of said constituent causes for want of equity be and the same are [fol. 72] hereby sustained, and that plaintiffs' petitions in each of said constituent causes be and the same are hereby dismissed.

It Is Further Ordered, Adjudged and Decreed that the costs incurred herein in each of said contituent causes be, and the same are, hereby adjudged against the respective plaintiffs therein.

It Is Further Ordered, That this decree be filed and entered in the above entitled cause No. 668 In Equity, and that conformed copies hereof be filed in each of the above styled causes In Equity Nos. 669, 670, 671 and 672.

J. W. Woodrough, Circuit Judge. Merrill E. Otis, District Judge. J. C. Collet, District Judge.

This March 16, 1938.

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[fol. 73] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER PENDING APPEAL—Filed March 16, 1938

Upon this 16th day of March, 1938, plaintiffs in each of the above entitled causes filed their application for a temporary order restraining enforcement of said "Discrimination Act" until final determination of their intended appeals to the Supreme Court of the United States, and same came on for hearing. Plaintiffs appeared by their attorneys, James P. Aylward, George V. Aylward, Ralph M. Russell and Terence M. O'Brien, and defendants appeared by their attorneys, Roy McKittrick, Attorney General of the State of Missouri, Edward H. Miller, Aubrey R. Hammett, Jr., and John W. Hoffman, Assistant At-

torneys General of the State of Missouri. And the Court being fully advised in the premises, finds that the facts stated in the application are true and that, pending final determination of the appeals herein to the Supreme Court [fol. 74] of the United States, defendants, and each of them, should be and they are hereby temporarily restrained from in any manner enforcing said "Discrimination Act", and it is so Ordered.

J. W. Woodrough, Circuit Judge. Merrill E. Otis, District Judge. J. C. Collet, District Judge.

Approved: James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, Attorneys for Plaintiffs in Each of the Above Entitled Causes. Roy McKittrick, by John W. Hoffman, Jr., Edward H. Miller, Attorneys for Defendants in Each of the Above Entitled Causes.

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[fol. 75] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 3, 1938

To the Honorable Joseph W. Woodrough, Circuit Judge, the Honorable John Caskin Collet, District Judge, the Honorable Merrill E. Otis, District Judge:

The above-named plaintiffs, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 16th day of March, A. D. 1938, do hereby appeal from the said decree to the Supreme Court of the United States, for the reasons set forth in the Assignment of Errors filed herein, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, under the Rules of such Court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, Solicitors for Plaintiffs.

[fol. 76] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed June 3, 1938

The appellants in the above entitled cause, and each of them, having prayed for allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled cause by the District Court of the United States for the Western District of Missouri, on the 16th day of March, 1938, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided;

It Is Now Here Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the District Court of the United States for the Western District of Missouri, Central Division, in this cause, as provided by law, and it is Further Ordered that the Clerk of the said Court shall prepare and certify a transcript of the record, proceedings and decree in this cause, and transmit the same to the Supreme Court so that he shall have the same in the said Court within 40 days of this date;

[fol. 77] And it is Further Ordered that security for costs on appeal be fixed in the sum of Two Hundred Fifty Dollars ($250.00).

J. W. Woodrough, United States Circuit Judge. Merrill E. Otis, United States District Judge. J. C. Collet, United States District Judge.

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[fols. 78-79] Bond on appeal for $250.00, approved and filed June 3, 1938, omitted in printing.

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[fol. 80] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 3, 1938

Come now Joseph S. Finch & Company, a corporation, The Old Quaker Company, a corporation, and Schenley

Distributors, Inc., a corporation, plaintiffs in the above-entitled cause, and file the following assignment of errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree of this court on the 16th day of March, 1938.

(1) The court erred in holding that the Missouri Anti-Discrimination Act, which provides in part as follows:

"Section 4. The transportation or importation into this state, or the purchase, sale, receipt, or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined. * * *",

and which is contained in and appears on pages 536 to 543, both inclusive, of the Laws of Missouri, 1937, does not violate the provisions of "The Commerce Clause" of the Constitution of the United States, contained in Section 8, [fol. 81] Article I thereof, which provides as follows: "The Congress shall have the power * * * to regulate commerce * * * among the several states * * * *", because it discriminates against and excludes the importation of intoxicating and non-intoxicating alcoholic liquors produced in the states of Indiana, Pennsylvania, Massachusetts and Michigan, whether sold in competition or not with other liquors, and otherwise unduly burdens and unlawfully restrains and interferes with interstate commerce.

(2) The court erred in holding that the Missouri Anti-Discrimination Act does not violate the provisions of Section 10, Article I of the Constitution of the United States, which provides as follows: "No state shall * * * pass any ex post facto law or law impairing the obligation of contracts * * * *", for the reason that said act impairs obligations under existing contracts of plaintiffs within the state of Missouri.

(3) The court erred in holding that the Missouri Anti-Discrimination Act does not violate the provisions of Section 2 of Article IV of the Constitution of the United States, which provides as follows: "The citizens of each state shall

be entitled to all privileges and immunities of citizens in the several states", because said act denies to plaintiffs the privileges and immunities of citizens in the several states, viz., in states other than Indiana, Pennsylvania, Massachusetts and Michigan.

(4) The court erred in holding that the Missouri Anti-Discrimination Act, contained in and appearing on pages 536 to 543, both inclusive, of the Laws of Missouri, 1937, does not violate the provisions of the "Due Process Clause" of the Constitution of the United States, contained in Section 1 of the XIV Amendment thereto, which provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person [fol. 82] of life, liberty or property without due process of law", because the Missouri Anti-Discrimination Act violates the "Due Process Clause" and, if enforced, will confiscate property of plaintiffs within the state of Missouri without due process of law.

(5) The Court erred in holding that the Missouri Anti-Discrimination Act, contained in and appearing on pages 536 to 543, both inclusive, of the Laws of Missouri, 1937, does not violate the provisions of the "Equal Protection Clause" of the Constitution of the United States, contained in Section 1 of the XIV Amendment thereto, which provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws", because the unreasonable and arbitrary classifications and restrictions imposed upon some importers of intoxicating liquors which are not imposed upon others similarly situated are not permitted by the XXI Amendment, but are violative of the "Due Process Clause".

(6) The court abused its discretion and erred in denying the interlocutory injunction.

(7) The court erred in dissolving the temporary restraining order heretofore issued herein.

(8) The court erred in denying the application for temporary and permanent injunction.

(9) The court erred in sustaining defendants' motion to dismiss plaintiffs' petition for want of equity.

(10) The court erred in dismissing plaintiffs' petition.

(11) The court erred in rendering a decree in conflict with opinions of another three-judge court in the same circuit (Eighth Circuit) on the same subject-matter, and particularly in conflict with the following cases decided by a three-judge court of the Eighth Circuit: Triner v. Arundel, 11 Fed. Supp. 145, (D. C. Minn.); Triner v. Mahoney, 20 Fed. [fols. 83-104] Supp. 1019, (D. C. Minn.), which held that in the absence of a decision of the Supreme Court of the United States holding that a state may, by virtue of the XXI Amendment, impose arbitrary and unreasonable restrictions upon some importers of intoxicating liquors which are not imposed upon others similarly situated, and which restrictions would otherwise be violative of the XIV Amendment, the court would not declare a Minnesota statute similar to the Missouri Act valid.

(12) The court erred in deciding an important question of general law in an untenable manner and in conflict with the weight of authority.

Wherefore, plaintiffs pray that the said decree may be reversed, and for such other and further relief as to the court may seem just and proper.

James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, Solicitors for Plaintiffs.

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[fol. 105] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 7, 1938

To A. L. Arnold, Clerk of the Above Court:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other, papers, to-wit:

(1) Temporary restraining order filed October 20, 1937.

(2) Notice to Governor and Attorney General of the date of presentation of application for interlocutory injunction.

(3) Order granting leave to amend bill of complaint.

(4) Amended bill of complaint.

(5) Motion to dismiss bill of complaint.

(6) Order empaneling the three-judge court and the designation of the judges thereof by the Senior Circuit Judge.

(7) Stipulation consolidating causes and providing that the hearing on interlocutory injunction should constitute the final hearing.

(8) Record entries showing submission of cause upon application for interlocutory injunction on January 10, 1938.

(9) Decree of the court filed March 16, 1938.

(10) Order extending temporary restraining order pending final determination on appeal.

[fol. 106] (11) Petition for appeal, order allowing appeal, bond on appeal, assignment of errors, citation to appellees, notice of appeal and statement directing appellees' attention to the provisions of Paragraph 3 of Rule 12 of the Supreme Court of the United States together with the acknowledgment of service of papers on the appellees as required by Paragraph 2 of Rule 12 of the Supreme Court of the United States; all filed June 2, 1938.

(12) The separate typewritten statement disclosing the jurisdiction of the Supreme Court of the United States upon appeal, with the opinion of the court delivered by Judge Otis and concurred in by Judges Woodrough and Collet.

(13) This praecipe with acknowledgment of service thereon.

You are requested to prepare this transcript as required by law and the rules of this court and the rules of the Supreme Court of the United States of America, and to file the same in the office of the Clerk of the United States Supreme Court in the city of Washington, D. C., on or before the 12th day of July, 1938, or at such later date as may be designated in an order of this court enlarging and extending said time.

Dated this 6th day of June, 1938.

James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, for Appellants.

Service of above Praecipe accepted and acknowledged this 6 day of June, 1938.

Roy McKittrick, Aubrey R. Hammett, Jr., Edward H. Miller, for Appellees.

[fol. 107] IN UNITED STATES DISTRICT COURT

Before Woodrough, Circuit Judge, Otis and Collet, District Judges

MEMORANDUM OPINION—Filed February 23, 1938

OTIS, District Judge, delivered the opinion of the Court:

Following the adoption of the Twenty-first Amendment to the Constitution may Missouri prohibit the sale within the state of intoxicating liquors manufactured in such other states as have laws discriminating against intoxicating liquors manufactured in other states (including Missouri)? More specifically, if Michigan has a law imposing a tax upon the importation of intoxicating liquors from Missouri and other States, which tax (or a tax similar in amount) Michigan manufacturers of intoxicating liquors are not required to pay, may Missouri lawfully prohibit the sale in Missouri of intoxicating liquors manufactured in Michigan? Such questions are presented by these cases. Missouri has such a statute. Laws of Missouri, 1937, 536. Section 4 of that statute provides:

"The transportation or importation into this state, or the purchase, sale, receipt or possession herein by any licensee of any alcoholic liquor manufactured in any 'state in which discrimination exists' is hereby prohibited, and it shall be [fol. 108] unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined."

The phrase, "state in which discrimination exists", is defined in the statute as we indicated in the first two sentences of this paragraph. The plaintiff (or plaintiffs) in each of the five cases is (or are) incorporated and manufacturing intoxicating liquors in a "state in which discrimination exists". The plaintiffs contend that the Missouri statute is invalid in that it violates (a) the "commerce clause" of the Constitution (Art. I, Sec. 9, Par. 8) and (b) the "equal protection clause" of the Fourteenth Amendment. They ask that the enforcement of the statute be enjoined.

The "Commerce Clause" and the Twenty-first Amendment

1. We would have thought that the first of the two contentions had in it much of merit were it not for the opinion and judgment of the Supreme Court in State Board v. Young's Market Co., 229 U. S. 59, decided December 9, 1936. That case involved the validity of a California statute imposing a license fee for importing beer. It was the opinion of the Court that while before the adoption of the Twenty-first Amendment that such a statute clearly would have been invalid ("because the fee would be a direct burden on interstate commerce" and because "the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide"), the effect of [fol. 109] Section 2* of the Amendment was to abrogate "the right to import free, so far as concerns intoxicating liquors" and to confer upon each state "the power to forbid all importations (of intoxicating liquors) which do not comply with the conditions which it prescribes." By reason of this opinion it must now be said that the implied prohibition upon state legislation arising from the "commerce clause" no longer exists, in so far as intoxicating liquors are concerned. So far as that one commodity is concerned the nation again is in that same situation in which it was as to all commerce before the adoption of the Constitution.

The "Equal Protection" Clause of the Fourteenth Amendment

2. The opinion and judgment in State Board v. Young's Market Co. do not, however, dispose of the second contention made by plaintiffs. It was indeed contended in that case that the challenged California statute violated the "equal protection" clause. The classification of that statute was: importers of beer and manufacturers of beer within the state. The statute discriminated against the first class in favor of the second class (although that discrimination perhaps was counterbalanced.) The Court said: "A clas-

* Section 2 of the Twenty-first Amendment provides that—
"The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

sification recognised by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." But the classifica-
[fol. 110] tion which is "recognised by the Twenty-first Amendment is one based on a distinction between intoxicating liquors manufactured within and without a state. It does not authorise a distinction between intoxicating liquors all of which are manufactured in other states. The classification made by the Missouri statute must stand or fall as may be required by the general principles developed for the enforcement of the Fourteenth Amendment.

The provision of the Fourteenth Amendment reading—"No state * * * shall deny to any person within its jurisdiction the equal protection of the laws", was most illuminated by the Supreme Court when long ago (1886) it said that the provision guaranteed to all persons "the protection of equal laws". Yick Wo v. Hopkins, 118 U. S. 356, 369. The laws of a state must apply equally to all persons in the same or a similar situation. These principles are elementary. Equally elementary is it that a state "when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects." Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560. What are the principles by which the propriety of a classification is to be determined?

These principles again and again have been stated by the Supreme Court. "* * * (Legislation) which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." Barbier v. Connolly, 113 U. S. 27, 32. "The Fourteenth Amendment * * * does not prohibit legislation which is
[fol. 111] limited * * * in the objects to which it is directed * * *. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions * * *." Hayes v. Missouri, 120 U. S. 68, 71. "(Classification) must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis * * * it (must be) one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification * * *." Gulf, Colorado and Santa Fe Railway v. Ellis, 165 U. S. 150, 155, quoted in Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560.

"* * * (It) is obvious that the legislature is the only judge of the policy of a proposed discrimination. * * * When a state legislature has declared that * * * policy requires a certain measure, its action should not be disturbed by the courts * * * unless they can see clearly that there is no fair reason for the law that would not require with legal force its excension to others whom it leaves untouched." Missouri, Kansas and Texas Railway Company v. May, 194 U. S. 267, 269.

"* * * (A) state may classify with reference to the evil to be prevented, and * * * if the class discriminated against is or reasonably might be considered to define those from whom the evil is to be feared, it properly may be picked out * * *." Patsone v. Pennsylvania, 232 U. S. 138, 144. (The case upheld a statute forbidding unnaturalized foreign born persons ow-ing shotguns). "It must be * * * said that reasonable classification implies action consistent with the legitimate interests of the state * * * these cannot [fol. 112] be so broadly conceived as to bring them into hostility to exclusive federal power." Truax v. Raich, 239 U. S. 33, 42. (The case involved an Arizona statute limiting employment of aliens lawfully within the United States). "Classification" * * * must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand." Ibid. "* * * (Classification) must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; * * * classification cannot be arbitrarily made without any substantial basis." Truax v. Corrigan, 257 U. S. 312, 337. * * *. (The) mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be purely arbitrary, oppressive or capricious. But the mere production of inequality is not enough. * * * The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary.'" Radici v. New York, 264 U. S. 292, 296. "(The Amendment) does require that the classification be not arbitrary, but based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation." Power Mfg. Co. v. Sanders, 274 U. S. 490, 493. "It never has been found possible to lay down any infallible or all-in-

clusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. * * * the nearest approach to a definite rule * * * is that while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation." Bayside Fish Flour Co. v. Gentry, et al., 297 U. S. 422, [fol. 113] 427.

Mr. Justice Sutherland's summary of the precedents in the case last cited undoubtedly is the best statement of a test we have. It is not "infallible", it is not "all-inclusive", but it fairly epitomizes what the Supreme Court has said since it first recognized many years ago the doctrine of classification in applications of the equal protection clause. With this test in mind and a challenged statute to be tested we might well proceed after the manner now indicated. Let it be determined: (1) what object the state seeks to accomplish by the challenged statute? (2) Does the statute place persons in two or more classes and apply differently to the different classes? (3) Can it reasonably be argued that the object of the statute will be promoted by a recognition of the differences between the classes and the different application of the statute to the several classes. If question 3 is answered in the affirmative, then, of course, the classification is not "arbitrary or capricious" and the equal protection clause is not violated. The statute may be invalid for some other reason but not because it conflicts with the Fourteenth Amendment.

What object does Missouri seek to accomplish by the challenged statute. Learned counsel for plaintiffs in their brief say that the statute was enacted "by reason of certain so-called discriminatory features in the laws of those states (Indiana, Pennsylvania, Massachusetts and Michigan) which the Legislature of Missouri believed to be harmful, not to the people as a whole, but to the brewers of Missouri who may desire to ship their products into Indiana, Pennsylvania, Massachusetts and Michigan." In his reply brief [fol. 114] the Attorney General says: The object was "by all legitimate means at its (i.e. the State's) command, to obtain a repeal of the hostile legislation (i.e. hostile to Missouri manufacturers of intoxicating liquors) in the states which had adopted protective tariffs (license-fees upon im-

portation of intoxicating liquors from Missouri and other states), and this method (i.e. the challenged statute) was chosen by Missouri when, in 1937, faced by a rising tide of discriminatory legislation in other states, its General Assembly enacted the Anti-discrimination Act." Counsel for the parties are right. Obviously the object of this statute was to promote the interests of Missouri brewers and distillers, engaged in an important industry. The statute tends to accomplish that object in two ways: (a) by shutting off some competition from the Missouri field; (b) by offering an inducement to other states to withdraw barriers to the products of this Missouri industry sought to be imported into those states. It would be idle to deny that such is the object of the statute and such the means by which the object is sought to be accomplished.

It would be idle to deny that the object aimed at by this statute is one proper to be sought after by the state. Of course Missouri may legislate to promote the interests of any Missouri industry. Barbier v. Connolly, 113 U. S. 27, 31. The welfare of the people depends upon the success of the industries of the state. By promoting the interests of first one industry and then another the state protects and advances the welfare of all the people. One piece of legislation will be designed to benefit those engaged in agriculture, another to benefit those engaged in mining, another to benefit those engaged in manufacturing. Nor is the benefit of any single piece of legislation confined to those who first receive it. What benefits the brewers, for example, benefits also those who labor in the breweries, benefits the farmers whose grains the brewers purchase, benefits the merchants patron-[fol. 115] ized by those more directly benefited. Men reasonably might argue that what benefits any one great industry in a state benefits the whole people.

The question remains: May it be contended with any reason that this proper object of legislation will be promoted by the classification of this statute? But the question is not difficult. Who will deny that at least it can be argued with a show of reason that the Missouri statute will tend to induce Indiana, and Pennsylvania and Massachusetts and Michigan to remove the barriers they have put up to shut out the products of the Missouri brewers and distillers (as well as like products from other states)? The Missouri statute discriminates between the manufacturers of intoxicating liquors in Indiana and those, for example, in Georgia,

but for no merely arbitrary or capricious reason (as the color of their hair or the fact that the name of one state begins with the letter "I" and the name of the other begins with the letter "G"). The Missouri statute discriminates against Indiana manufacturers in favor of those in Georgia because Indiana discriminates against Missouri manufacturers and Georgia does not. The discrimination is certainly bottoned on reason, not caprice. It is bottomed on the same reason as supports those national laws which effectuate the raising and lowering of our tariffs against goods imported from foreign countries as they raise and lower their tariffs against American manufactured goods.

Conceding that the classification made in a statute is reasonably related to the object sought to be achieved by the statute, the statute must be held not to violate the equal protection clause. If the means (aside from the classification) by which the object sought to be achieved violated some provision of the Constitution other than the equal protection clause, that is a different matter. In Truax v. Raich, supra, the statute involved was held unconstitutional because the means whereby its object was sought to be achieved was [fol. 116] inconsistent with the exclusive federal power over immigration and its incidents and not because the classification had no reasonable justification. Before the adoption of the Twenty-First Amendment the statute now before us would have been held invalid because its lawful object would have sought to have been achieved by a means violating the implied prohibition of the commerce clause. But no provision of the Constitution can be pointed to which this statute now violates either in its object or the means whereby the object is sought to be achieved.

The problem may appear simpler if we suppose that the Missouri statute does not absolutely prohibit the importation of intoxicating liquors from discriminating states but puts up exactly the same barriers (i.e. license fees for importation) against the importation of intoxicating liquors from those states which they have put up against intoxicating liquors imported from Missouri and other states. Would it be said that Missouri cannot impose a license fee on intoxicating liquors imported from California which imposes a license fee on intoxicating liquors imported from Missouri, unless Missouri also imposes a license fee on intoxicating liquors imported from Texas which does not impose a license

fee on intoxicating liquors imported from Missouri? Would it be said that Missouri cannot impose a license tax on Iowa automobiles using Missouri roads and exempt Illinois automobiles from the same tax, solely because Iowa imposes and Illinois does not impose a license tax on Missouri automobiles using their respective highways. The Supreme Court has said, at least by way of clear dictum, that the last mentioned distinction is valid. Kane v. New Jersey, 242 U. S. 160, 167. The two cases are identical in principle. But if Missouri can put up a hurdle against California which it is not required to put up against Texas, it can erect also an impassable barrier (complete prohibition) against Cali- [fol. 117] fornia while allowing free ingress to importations of intoxicating liquors from Texas.

3. Since the submission of this case a three judge court for the Eastern District of Michigan in a similar case has reached the same conclusion as that indicated in this opinion. Indianapolis Brewing Co. v. The Liquor Control Commission,—Supp—

Findings of Fact and Conclusions of Law

We find the facts to be as stipulated by the parties and conclude as a matter of law that the bills should be dismissed.

The Attorney General will submit appropriate forms of decrees.

[File endorsement omitted.]

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[fol. 118] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 119] In United States District Court

[Title omitted]

Order Extending Time to File Transcript of Record

For satisfactory reasons appearing to the Court, the time for filing the record in this case in the Supreme Court of the United States of America, pursuant to the appeal allowed

and citation issued herein, is hereby extended to August 12, 1938.

Dated this 23rd day of June, 1938.

J. W. Woodrough, United States Circuit Judge. Merrill E. Otis, United States District Judge. J. C. Collet, United States District Judge.

Attest. A true copy.

A. L. Arnold, Clerk, Edna D. Morris, Deputy. (Seal.)

[fol. 119a] [File endorsement omitted.]

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[fol. 120] SUPREME COURT OF THE UNITED STATES

STATE OF NEW YORK,
County of New York, ss:

Roberts G. Wilkens, being duly sworn, deposes and says that he is associated with Messrs. White & Case, the attorneys herein for the appellants, whose office is at 14 Wall Street, New York, N. Y.; that on the 3rd day of August, 1938, he served a copy of the annexed Statement of Points Relied on by Appellants under Rule 13, Paragraph 9, upon Honorable Roy McKittrick, Attorney General of the State of Missouri, Jefferson City, Missouri, by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at 14 Wall Street in said County of New York, addressed to said Attorney General, at Jefferson City, Missouri, that being the address within the state designated by him for that purpose upon the preceding papers in this action or the place where he then kept an office.

Deponent is over the age of twenty-one years.

Robert G. Wilkens.

Sworn to before me this 4th day of August, 1938. Edward D. Robbins, Notary Public, New York County, N. Y. Co. Clk's No. 394, Reg's No. O-R-519. Cert. Filed in Bronx Co. No. 51, Reg. No. 177R40. Cert. Filed in Kings Co. No. 194, Reg. No. 448. Cert. Filed in Queens Co. No. 984, Reg. No. 3651. Commission Expires March 30, 1940. (Seal.)

[fol. 121] SUPREME COURT OF THE UNITED STATES

252-256, Inc.

[Title omitted]

[fol. 122] APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON PURSUANT TO RULE 13, PARAGRAPH 9—Filed August 5, 1938

Now come the appellants herein and for their statement of points to be relied on by them upon their appeals to this Court, pursuant to Rule 13, Paragraph 9, respectfully show as follows:

1. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and particularly Section 2 thereof, is unconstitutional because, contrary to the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, it arbitrarily, capriciously and evasively classifies, without any reasonable relation to the police power or the power vested in the states under the Twenty-first Amendment of the Constitution of the United States of America, out-of-state distillers and wholesale liquor dealers in such a manner as to arbitrarily and capriciously discriminate against certain of such distillers and wholesale liquor dealers, including the appellants.

2. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and partic-
[fol. 123] ularly Section 2 thereof, is unconstitutional and in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America because, in violation of the provisions of that section of the Constitution of the United States of America, the statute deprives appellants of their property without due process of law.

3. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and particularly Section 2 thereof, is unconstitutional and violates Section 1 of the Fourteenth Amendment of the Constitution of the United States of America in that it fails to apply equally to persons and corporations in Missouri and to

persons and corporations domiciled outside of Missouri lawfully transacting business therein and similarly situated and engaged in a similar business therein.

4. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and particularly Section 2 thereof, is unconstitutional and violates the provisions of the Commerce Clause of Section 8, Article 1, of the Constitution of the United States in that it places upon certain distillers, including the appellants, an undue burden in their interstate business which is in no way related to the control, regulation or prohibition of the use of intoxicating liquors in the State of Missouri but is in fact an attempt by the Legislature of the State of Missouri to enact extra-territorial legislation and by economic pressure upon citizens and corporations organized under the laws of certain sister states whose laws are thought by the Legislature of Missouri to be contrary to the view that the Missouri Legislature believes the laws of such states ought to be, to compel the repeal or amendment of the laws of such sister states.

[fol. 124] 5. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and particularly Section 2 thereof, is unconstitutional because, contrary to the provisions of Section 10 of Article 1 of the Constitution of the United States, it constitutes a law which is ex post facto and impairs the obligation of contract.

6. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and particularly Section 2 thereof, is unconstitutional because, contrary to the provisions of Article 4, Section 2, of the Constitution of the United States, it deprives the appellants of the privileges and immunities of citizens of the several states.

7. The District Court erred in dissolving the temporary restraining order issued upon the filing of the bill of complaint.

8. The District Court erred in denying the appellants' applications for temporary and permanent injunctions.

9. The District Court erred in sustaining the appellees' motions to dismiss the appellants' petitions for want of equity and in refusing to sustain the petitions upon the

ground that the Missouri Anti-Discrimination Act was unconstitutional.

Yours, etc., Joseph M. Hartfield, Esq., Attorney for Appellants, 14 Wall Street, New York, N. Y.

To Hon. Roy McKittrick, Attorney General of the State of Missouri, Jefferson City, Mo.

[fol. 124a] [File endorsement omitted.]

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[fol. 125] SUPREME COURT OF THE UNITED STATES

No. 252-256, Inc.

[Titles omitted]

STIPULATION TO SUBMIT CASES NO. 252 TO 256, INC., TO THE COURT UPON THE PRINTED RECORD IN CASE NO. 252—Filed September 8, 1938

It is Stipulated between counsel for the appellants and appellees herein that printing of the transcript of the record in each of the five above entitled causes be dispensed with and that in lieu thereof the transcript of the record in Cause No. 252, entitled Joseph S. Finch & Company, The Old Quaker Company, and Schenley Distributors, Inc., Appellants, against Roy McKittrich, Attorney General of the State of Missouri, et al., Appellees; be printed by the Clerk, filed in his office and delivered to counsel for the respective parties.

It is Further Stipulated that all five causes above entitled, numbered 252 through 256 inclusive, be submitted to [fol. 126] the Court for its consideration and determination upon the printed record in said Cause No. 252.

It is Further Stipulated that the decision and determination of the Court in Cause No. 252 shall constitute the decision and determination of the Court in each of the other four causes above entitled numbered 253, 254, 255 and 256, respectively, with the same force and effect as though the transcript of the record in each of said causes had been printed in full and separately considered by the Court in arriving at its decision.

It is Further Stipulated that subject to the approval of the Court, counsel for any party hereto may on his brief or in his argument refer to any portion of the transcript of the record filed with the Clerk of the Court in any of the causes.

It is Further Stipulated that the Court's mandate in each cause shall be governed by and be in accordance with its decision in Cause No. 252.

It is Further Stipulated that this stipulation be added to the transcript of the record in Cause No. 252 and be printed as part of the record therein.

Dated: August 30, 1938.

Joseph M. Hartfield, Thomas Kiernan, Counsel for Appellants. Roy McKittrick, Edward H. Miller, Counsel for Appellees.

[fol. 127] State of New York,
County of New York, ss:

Thomas Kiernan, being duly sworn, says:

He is an attorney at law associated with Joseph M. Hartfield, counsel for the appellants in the above entitled appeals.

On September 7th, 1938, deponent mailed to Edward H. Miller, Assistant Attorney General of the State of Missouri, in a securely sealed envelope with the necessary prepaid postage attached thereto, a copy of the attached designation addressed to the said Edward H. Miller at his office, 1610 Boatmen's Bank Building, St. Louis, Missouri.

Deponent further states that said Edward H. Miller is address to which deponent forwarded the said designation. is the address given deponent by the said Edward H. Miller as his office address within the State of Missouri.

Thomas Kiernan.

Sworn to before me this 7th day of September, 1938. Edward D. Robbins, Notary Public, New York County. N. Y. Co. Clk's No. 394, Reg's No. O-R-519. Cert. Filed in Bronx Co. No. 51, Reg. No. 177R40. Cert. Filed in Kings Co. No. 194, Reg. No. 448. Cert. Filed in Queens Co. No. 984, Reg. No. 3661. Commission Expires March 30, 1940. (Seal.)

[fol. 128] SUPREME COURT OF THE UNITED STATES

[fol. 129] DESIGNATION OF PARTS OF RECORD TO BE PRINTED PURSUANT TO RULE XIII, PARAGRAPH 9.—Filed September 8, 1938

To the Clerk of the Supreme Court of the United States:

The appellants herein, pursuant to Rule XIII, Paragraph 9, of this Court, designate the following parts of the record as being necessary to the consideration of the appeals herein:

1. Temporary restraining order filed October 20, 1937.
2. Notice to Governor and Attorney General of the date of presentation of application for interlocutory injunction.
3. Order granting leave to amend bill of complaint.
4. Amended bill of complaint.
5. Motion to dismiss bill of complaint.
6. Order empaneling the three-judge court and the designation of the judges thereof by the Senior Circuit Judge.
7. Stipulation consolidating causes and providing that the hearing on interlocutory injunction should constitute the final hearing.
8. Record entries showing submission of cause upon application for interlocutory injunction on January 10, 1938.
9. Decree of the court filed March 16, 1938.
10. Order extending temporary restraining order pending final determination on appeal.

[fol. 130] 11. Petition for appeal, order allowing appeal, bond on appeal, assignment of errors, citation to appellees, notice of appeal and statement directing apellees' attention to the provisions of Paragraph 3 of Rule XII of the Supreme Court of the United States together with the acknowledgment of service of papers on the appellees as required by Paragraph 2 of Rule XII of the Supreme Court of the United States; all filed June 2, 1938.

12. The separate typewritten statement disclosing the jurisdiction of the Supreme Court of the United States upon appeal, with the opinion of the court delivered by Judge Otis and concurred in by Judges Woodrough and Collet.

13. Præcipe for transcript of record with acknowledgment of service thereon.

14. Stipulation dated August 30, 1938 entered into by the counsel for the respective parties dispensing with the printing of the record except in cause designated No. 252, etc.

15. Statement of points relied on by appellants.

Dated: September 7, 1938.

Yours, etc., Joseph M. Hartfield, Thomas Kiernan, James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, Counsel for Appellants.

[fol. 131] [File endorsement omitted.]

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Endorsed on cover: File No. 42, 737. W. Missouri, D. C. U. S. Term No. 252. Joseph S. Finch & Company, The Old Quaker Company, and Schenley Distributors, Inc., appellants, vs. Roy McKittrick, Attorney General of the State of Missouri, et al. Filed August 5, 1938. Term No. 252, O. T., 1938.

(7986)

FILED
AUG 5 1938
CHARLES ELMORE CROPLEY
CLERK

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1938

**No. 252**

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, AND SCHENLEY DISTRIBUTORS, INC.,
*Appellants,*
vs.
ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

**No. 253**

BEN BURK, INC.,
*Appellant,*
vs.
ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

**No. 254**

JOSEPH E. SEAGRAM & SONS, INCORPORATED, AND SEAGRAM DISTILLERS CORPORATION,
*Appellants,*
vs.
ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

**No. 255**

HINRICHS DISTILLED PRODUCTS,
*Appellant,*
vs.
ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

**No. 256**

ARROW DISTILLERIES, INC.,
*Appellant,*
vs.
ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

# STATEMENT AS TO JURISDICTION.

JOSEPH M. HARTFIELD,
JAMES P. AYLWARD,
THOMAS KIERNAN,
GEORGE V. AYLWARD,
TERENCE M. O'BRIEN,
RALPH M. RUSSELL,
*Counsel for Appellants.*

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1938

**No. 252**

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, AND SCHENLEY DISTRIBUTORS, INC.,

*Appellants,*

*vs.*

ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

**No. 253**

BEN BURK, INC.,

*Appellant,*

*vs.*

ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

**No. 254**

JOSEPH E. SEAGRAM & SONS, INCORPORATED, AND SEAGRAM DISTILLERS CORPORATION,

*Appellants,*

*vs.*

ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

**No. 255**

HINRICHS DISTILLED PRODUCTS,

*Appellant,*

*vs.*

ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

**No. 256**

ARROW DISTILLERIES, INC.,

*Appellant,*

*vs.*

ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

## APPLICANTS' STATEMENT, DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE DECREE IN QUESTION.

(Filed in United States District Court on June 4, 1938.)

Pursuant to Rule Twelve (12), Paragraph One (1), of the Supreme Court of the United States, effective July 1, 1936,

applicants file this their statement, showing the basis on which the applicants contend the Supreme Court of the United States has appellate jurisdiction to review the decree appealed from herein, which, omitting caption and signatures, is as follows:

"These causes having come on for hearing as a consolidated cause, pursuant to stipulation of the parties that said causes should be consolidated for all purposes including hearing, consideration, decision, determination and review, on January 10, 1938, before the Honorable J. W. Woodrough, United States Circuit Judge, the Honorable Merrill E. Otis, District Judge of the Western District of Missouri, Central Division, and the Honorable John C. Collet, District Judge for the State of Missouri, sitting in said Western District of Missouri, Central Division, sitting as a three-judge District Court, duly convened pursuant to the provisions of Section 266, as amended, of the United States Judicial Code, on the several petitions of plaintiffs praying for a temporary and permanent injunction against the defendants from enforcing the provisions of an act of the Legislature of Missouri, contained at pages 536 to 543, both inclusive, of the Laws of Missouri, 1938, being an act entitled "An Act prohibiting licensees from transporting or importing into this state, purchasing, receiving, possessing and selling intoxicating liquor and non-intoxicating beer manufactured or bottled in any state, the laws, rules or regulations of which discriminate against intoxicating liquor or non-intoxicating beer manufactured in this state or against those selling or dealing therein, defining discriminatory laws and prescribing the duties of the Attorney General with respect to determining the existence of the discriminations and providing for an appeal from his findings; prescribing the duties of the Supervisor of Liquor Control with respect to the enforcement of this act and providing for the revocation of licenses for a violation of this act, and defendants' motions to dismiss said petitions, and the causes having been duly heard and submitted as a con-

solidated cause before said three-judge court on said motions to dismiss said petitions and the argument of counsel thereon, and on the stipulations of the respective parties that said several causes should be taken as submitted, and finally heard and determined, and final decree entered therein, upon the pleadings as aforesaid, and the Court being now fully advised in the premises, it is

Ordered, Adjudged and Decreed, That said Act of the Legislature of Missouri, contained on pages 536 to 543, both inclusive, of the Laws of Missouri, 1937, heretofore in this decree particularly designated, does not violate the provisions of the Commerce Clause of the Constitution of the United States contained in Section 8, Article I thereof, or the Equal Protection Clause of said Constitution contained in Section 1 of the Fourteenth Amendment thereto.

It is Further Ordered, Adjudged and Decreed that the temporary restraining orders heretofore issued in the several constituent causes be, and the same hereby are, dissolved.

It is Further Ordered, Adjudged and Decreed that the applications for a temporary injunction and for a permanent injunction in each of the constituent causes be, and the same hereby are, denied.

It is Further Ordered, Adjudged and Decreed that the defendants' motions to dismiss the petitions in each of said constituent causes for want of equity be and the same are hereby sustained, and that plaintiffs' petitions in each of said constituent causes be and the same are hereby dismissed.

It is Further Ordered, Adjudged and Decreed that the costs incurred herein in each of said constituent causes be, and the same are, hereby adjudged against the respective plaintiffs therein.

It is Further Ordered, That this decree be filed and entered in the above entitled cause No. 668 in equity, and that conformed copies hereof be filed in each of the above-styled causes in equity Nos. 669, 670, 671 and 672."

I.

(a) The statute believed to sustain the appellate jurisdiction of the Supreme Court of the United States is the *Act of Congress of June* 18, 1910, *C.* 309, *Sec.* 17, 36 *Stat.* 557; *March* 3, 1911, *C.* 231, *Sec.* 266, 36 *Stat.* 1162; *March* 4, 1913, *C.* 160, 37 *Stat.* 1013; *February* 13, 1925, *C.* 229, *Sec.* 1, 43 *Stat.* 936-938 (28 *U. S. C. A., Sec.* 380).

(b) The statute of the State of Missouri, the validity of which is involved herein, is an *Act of the Fifty-ninth General Assembly of the State of Missouri, approved April* 8, 1937 (*Laws of Missouri,* 1937, *page* 536) known as the "*Anti-Discriminatory Liquor Law.*" Pertinent provisions of the Missouri Anti-Discrimination Act are as follows:

> "Section 4. The transportation or importation into this state, or the purchase, sale, receipt or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined. * * *"

(c) The following causes:

In Equity No. 668, JOSEPH S. FINCH & COMPANY, a corporation, Pennsylvania, THE OLD QUAKER COMPANY, a corporation, Maryland, and SCHENLEY DISTRIBUTORS, INC., a corporation, Delaware, Plaintiffs, versus ROY MCKITTRICK, Attorney General of the State of Missouri, and THOMAS F. FITZGERALD, Supervisor of Liquor Control of the State of Missouri, Defendants;

In Equity No. 669, BEN BURK, INC., a corporation, Massachusetts, versus ROY MCKITTRICK, Attorney General of the State of Missouri, and THOMAS F. FITZGERALD, Supervisor of Liquor Control of the State of Missouri, Defendants;

In Equity No. 670, JOSEPH E. SEAGRAM & SONS, INCORPORATED, an Indiana Corporation, and SEAGRAM DISTILLERS CORPORATION, a Delaware Corporation, Plaintiffs, versus ROY MCKITTRICK, Attorney General of the State of Missouri, and THOMAS F. FITZGERALD, Supervisor of Liquor Control of the State of Missouri, Defendants;

In Equity No. 671, HINRICHS DISTILLED PRODUCTS, a corporation, Missouri, Plaintiff, versus ROY MCKITTRICK, Attorney General of the State of Missouri, and THOMAS F. FITZGERALD, Supervisor of Liquor Control of the State of Missouri, Defendants;

In Equity No. 672, ARROW DISTILLERIES, INC., a corporation, Michigan, Plaintiff, versus ROY MCKITTRICK, Attorney General of the State of Missouri, and THOMAS F. FITZGERALD, Supervisor of Liquor Control of the State of Missouri, Defendants;

were by stipulation consolidated for all purposes, including hearing, consideration, decision, determination and review. It was also stipulated at the same time the court heard and determined the application for an interlocutory injunction, it also finally heard and determined these causes and entered its final decree.

(d) Written notice was duly given, more than five (5) days before said causes were heard, to the Honorable Lloyd C. Stark, Governor of the State of Missouri, and to the Honorable Roy McKittrick, Attorney General of the State of Missouri.

(e) The decree appealed from was entered on the 16th day of March, A. D. 1938, and the application for appeal is presented on this 3rd day of June, A. D. 1938.

Plaintiffs, by their bill in equity, sought to enjoin the defendants from enforcing said act, alleging that said Anti-Discrimination Act is in violation of the Constitution of the

United States and, therefore, invalid and void upon the following grounds:

(1) That it violates *Section 8 of Article I of the Constitution of the United States* (*"Commerce Clause"*);

(2) That it violates *Section 10 of Article I of the Constitution of the United States* (*impairing obligation of contracts*);

(3) That it violates *Section 2 of Article IV of the Constitution of the United States* (*"Privileges and Immunities Clause"*);

(4) That it violates the *XIV Amendment to the Constitution of the United States* (*"Due Process Clause"*);

(5) That it violates the *XIV Amendment to the Constitution of the United States* (*"Equal Protection Clause"*).

The bill of the plaintiffs was pending before the Honorable J. C. Collet, District Judge, in the District Court of the United States for the Western District of Missouri, Central Division, who, upon motion properly filed, determined that the pleadings drew into question the constitutionality of the Missouri Statute above referred to, and that an interlocutory and permanent injunction was being sought upon the ground that such statute was repugnant to the Constitution of the United States. Judge Collet thereupon immediately requested the Senior Circuit Judge of the Circuit Court in which the District Court was located, to designate two (2) other judges to participate in hearing and determining the application for an injunction.

The Senior Circuit Judge designated the Honorable Joseph W. Woodrough, Circuit Judge, and the Honorable Merrill E. Otis, District Judge, to sit with Judge Collet, and empaneled the three-judge court to hear and determine the application for the injunction. The cause proceeded to hearing and determination before the three-judge court and

on the 16th day of March, A. D. 1938, a decree sustaining defendants' motion to dismiss and dismissing the bill and denying the injunction, was entered. The opinion sustained the validity of the Missouri Act assailed.

It is the contention of the applicants that the Constitutional questions involved are substantial. The question of the constitutionality of the challenged act was properly before the three-judge court for determination:

*Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 79 L. Ed. 1322;

*Ex parte Bank of New York*, 278 U. S. 101, 73 L. Ed. 202;

*Ex parte Poresky*, 290 U. S. 30, 78 L. Ed. 152;

*In re Buder*, 271 U. S. 461, 70 L. Ed. 1036.

The three-judge court having been legally assembled under the *Act of June* 18, 1910, *March* 3, 1911, *March* 4, 1913 *and February* 13, 1925, *supra*, properly assumed jurisdiction of all the questions involved, and under the plain provisions of the act, the appeal is direct to this Court:

*Corporation Commission* v. *Cary*, 296 U. S. 452, 80 L. Ed. 324;

*Ex parte Collins*, 277 U. S. 565, 72 L. Ed. 990;

*Oklahoma Gas* v. *Oklahoma Packing Co.*, 292 U. S. 386, 78 L. Ed. 1318;

*Stratton* v. *St. Louis Ry. Co.*, 282 U. S. 10, 75 L. Ed. 135;

*P. S. Com.* v. *Wisc. Tel. Co.*, 289 U. S. 67, 77 L. Ed. 1036;

*Lawrence* v. *Rwy.*, 274 U. S. 588, 71 L. Ed. 1319;

*In re Buder*, 271 U. S. 461, 70 L. Ed. 1036.

It is claimed by applicants that the District Court erred in denying the injunction, in the following particulars:

(1) The court erred in holding that the *Missouri Anti-Discrimination Act*, which provides in part as follows:

> "SECTION 4. The transportation or importation into this state, or the purchase, sale, receipt, or possession

> herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined. * * *."

and which is contained in and appears on *pages* 536 *to* 543, *both inclusive, of the Laws of Missouri,* 1937, does not violate the provisions of *"The Commerce Clause" of the Constitution of the United States, contained in Section* 8, *Article I thereof,* which provides as follows: "The Congress shall have the power * * * to regulate commerce * * * among the several states * * *", because it discriminates against and excludes the importation of intoxicating and non-intoxicating alcoholic liquors produced in the States of Indiana, Pennsylvania, Massachusetts and Michigan, whether sold in competition or not with other liquors, and otherwise unduly burdens and unlawfully restrains and interferes with interstate commerce.

(2) The court erred in holding that the *Missouri Anti-Discrimination Act* does not violate the provisions of *Section* 10, *Article I of the Constitution of the United States,* which provides as follows: "No state shall * * * pass any *ex post facto* law or law impairing the obligation of contracts * * *", for the reason that said act impairs obligations under existing contracts of plaintiffs within the State of Missouri.

(3) The court erred in holding that the *Missouri Anti-Discrimination Act* does not violate the provisions of *Section* 2 *of Article IV of the Constitution of the United States,* which provides as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states", because said act denies to plaintiffs the privileges and immunities of citizens in the several States,

viz., in States other than Indiana, Pennsylvania, Massachusetts and Michigan.

(4) The court erred in holding that the *Missouri Anti-Discrimination Act*, contained in and appearing on *pages 536 to 543, both inclusive, of the Laws of Missouri*, 1937, does not violate the provisions of the *"Due Process Clause" of the Constitution of the United States, contained in Section 1 of the XIV Amendment thereto*, which provides as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law", because the *Missouri Anti-Discrimination Act* violates the *"Due Process Clause"* and, if enforced, will confiscate property of plaintiffs within the State of Missouri without due process of law.

(5) The court erred in holding that the *Missouri Anti-Discrimination Act*, contained in and appearing on *pages 536 to 543, both inclusive, of the Laws of Missouri*, 1937, does not violate the provisions of the *"Equal Protection Clause" of the Constitution of the United States*, contained in *Section 1 of the XIV Amendment thereto*, which provides as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws", because the unreasonable and arbitrary classifications and restrictions imposed upon some importers of intoxicating liquors which are not imposed upon others similarly situated are not permitted by the XXI Amendment, but are violative of the *"Due Process Clause"*.

(6) The court abused its discretion and erred in denying the interlocutory injunction.

(7) The court erred in dissolving the temporary restraining order heretofore issued herein.

(8) The court erred in denying the application for temporary and permanent injunction.

(9) The court erred in sustaining defendants' motion to dismiss plaintiffs' petition for want of equity.

(10) The court erred in dismissing plaintiffs' petition.

(11) The court erred in rendering a decree in conflict with opinions of another three-judge court in the same circuit (Eighth Circuit) on the same subject-matter, and particularly in conflict with the following cases decided by a three-judge court of the Eighth Circuit: *Triner* v. *Arundel*, 11 Fed. Supp. 145, (D. C. Minn.); *Triner* v. *Mahoney*, 20 Fed. Supp. 1019 (D. C. Minn.), which held that in the absence of a decision of the Supreme Court of the United States holding that a State may, by virtue of the XXI Amendment, impose arbitrary and unreasonable restrictions upon some importers of intoxicating liquors which are not imposed upon others similarly situated, and which restrictions would otherwise be violative of the XIV Amendment, the court would not declare a Minnesota Statute similar to the Missouri Act valid.

(12) The court erred in deciding an important question of general law in an untenable manner and in conflict with the weight of authority.

The applicants append hereto copies of all opinions delivered in this cause.

Respectfully submitted.

JOSEPH M. HARTFIELD,
THOMAS KIERNAN,
JAMES P. AYLWARD,
GEORGE V. AYLWARD,
TERENCE M. O'BRIEN,
RALPH M. RUSSELL,
*Solicitors for Plaintiffs.*

## EXHIBIT "A."

### Memorandum Opinion.

(Filed in the U. S. District Court on Feb. 23, 1938.)

Before Woodrough, Circuit Judge, Otis and Collet, District Judges.

OTIS, *District Judge*, delivered the opinion of the Court:

Following the adoption of the Twenty-first Amendment to the Constitution may Missouri prohibit the sale within the state of intoxicating liquors manufactured in such other states as have laws discriminating against intoxicating liquors manufactured in other states (including Missouri)? More specifically, if Michigan has a law imposing a tax upon the importation of intoxicating liquors from Missouri and other States, which tax (or a tax similar in amount) Michigan manufacturers of intoxicating liquors are not required to pay, may Missouri lawfully prohibit the sale in Missouri of intoxicating liquors manufactured in Michigan? Such questions are presented by these cases. Missouri has such a statute. Laws of Missouri, 1937, 536. Section 4 of that statute provides:

> "The transportation or importation into this state, or the purchase, sale, receipt or possession herein by any licensee of any alcoholic liquor manufactured in any 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined."

The phrase, "state in which discrimination exists", is defined in the statute as we indicated in the first two sentences of this paragraph. The plaintiff (or plaintiffs) in each of the five cases is (or are) incorporated and manufacturing intoxicating liquors in a "state in which discrimination exists". The plaintiffs contend that the Missouri statute is invalid in that it violates (a) the "commerce clause" of the

Constitution (Art. I, Sec. 9, Par. 8) and (b) the "equal protection clause" of the Fourteenth Amendment. They ask that the enforcement of the statute be enjoined.

*The "Commerce Clause" and the Twenty-first Amendment.*

1. We would have thought that the first of the two contentions had in it much of merit were it not for the opinion and judgment of the Supreme Court in *State Board* v. *Young's Market Co.*, 229 U. S. 59, decided December 9, 1936. That case involved the validity of a California statute imposing a license fee for importing beer. It was the opinion of the Court that while before the adoption of the Twenty-first Amendment that such a statute clearly would have been invalid ("because the fee would be a direct burden on interstate commerce" and because "the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide"), the effect of Section 2* of the Amendment was to abrogate "the right to import free, so far as concerns intoxicating liquors" and to confer upon each state "the power to forbid all importations (of intoxicating liquors) which do not comply with the conditions which it prescribes." By reason of this opinion it must now be said that the implied prohibition upon state legislation arising from the "commerce clause" no longer exists, in so far as intoxicating liquors are concerned. So far as that one commodity is concerned the nation again is in that same situation in which it was as to all commerce before the adoption of the Constitution.

*The "Equal Protection" Clause of the Fourteenth Amendment.*

2. The opinion and judgment in *State Board* v. *Young's Market Co.* do not, however, dispose of the second contention made by plaintiffs. It was indeed contended in that case that the challenged California statute violated the "equal protection" clause. The classification of that stat-

* Section 2 of the Twenty-First Amendment provides that—

"The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

ute was: *importers* of beer and *manufacturers of beer within the state*. The statute discriminated against the first class in favor of the second class (although that discrimination perhaps was counterbalanced). The Court said: "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth." But the classification which is "recognized by the Twenty-First Amendment" is one based on a distinction between intoxicating liquors manufactured *within* and *without* a state. It does not authorize a distinction between intoxicating liquors all of which are manufactured in other states. The classification made by the Missouri statute must stand or fall as may be required by the general principles developed for the enforcement of the Fourteenth Amendment.

The provision of the Fourteenth Amendment reading—"No state * * * shall deny to any person within its jurisdiction the equal protection of the laws", was most illuminated by the Supreme Court when long ago (1886) it said that the provision guaranteed to all persons "the protection of equal laws". *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369. The laws of a state must apply equally to all persons in the same or a similar situation. These principles are elementary. Equally elementary is it that a state "when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects." *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 560. What are the principles by which the propriety of a classification is to be determined?

These principles again and again have been stated by the Supreme Court. * * * (Legislation) which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." *Barbier* v. *Connolly,* 113 U. S. 27, 32. "The Fourteenth Amendment * * * does not prohibit legislation which is limited * * * in the objects to which it is directed * * *. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions * * *." *Hayes* v. *Missouri,* 120 U. S. 68, 71. "(Classification) must always rest upon some difference which bears a reasonable and just relation to the act in respect to which

the classification is proposed, and can never be made arbitrarily and without any such basis * * * it (must be) one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification * * *." *Gulf, Colorado and Santa Fe Railway* v. *Ellis*, 165 U. S. 150, 155, quoted in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 560. "* * * (It) is obvious that the legislature is the only judge of the policy of a proposed discrimination. * * * When a state legislature has declared that * * * policy requires a certain measure, its action should not be disturbed by the courts * * * unless they can see clearly that there is no fair reason for the law that would not require with legal force its extension to others whom it leaves untouched." *Missouri, Kansas and Texas Railway Company* v. *May*, 194 U. S. 267, 269.

"* * * (A) state may classify with reference to the evil to be prevented, and * * * if the class discriminated against is or reasonably might be considered to define those from whom the evil is to be feared, it properly may be picked out * * *." *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144. (The case upheld a statute forbidding unnaturalized foreign born persons owning shotguns.) "It must be * * * said that reasonable classification implies action consistent with the legitimate interests of the state * * * these cannot be so broadly conceived as to bring them into hostility to exclusive federal power." *Truax* v. *Raich*, 239 U. S. 33, 42. (The case involved an Arizona statute limiting employment of aliens lawfully within the United States.) "Classification" * * * must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand." *Ibid.* "* * * (Classification) must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; * * * classification cannot be arbitrarily made without any substantial basis." *Truax* v. *Corrigan*, 257 U. S. 312, 337. * * *. (The) mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be purely arbi-

trary, oppressive or capricious. But the mere production of inequality is not enough. * * * The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary.'" *Radici* v. *New York*, 264 U. S. 292, 296. "(The Amendment) does require that the classification be not arbitrary, but based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation." *Power Mfg. Co.* v. *Sanders*, 274 U. S. 490, 493. "It never has been found possible to lay down any infallible or all-inclusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. * * * the nearest approach to a definite rule * * * is that while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation." *Bayside Fish Flour Co.* v. *Gentry et al.*, 297 U. S. 422, 427.

Mr. Justice Sutherland's summary of the precedents in the case last cited undoubtedly is the best statement of a test we have. It is not "infallible", it is not "all-inclusive", but it fairly epitomizes what the Supreme Court has said since it first recognized many years ago the doctrine of classification in applications of the equal protection clause. With this test in mind and a challenged statute to be tested we might well proceed after the manner now indicated. Let it be determined: (1) what object the state seeks to accomplish by the challenged statute? (2) Does the statute place persons in two or more classes and apply differently to the different classes? (3) Can it reasonably be argued that the object of the statute will be promoted by a recognition of the differences between the classes and the different application of the statute to the several classes? If question 3 is answered in the affirmative, then, of course, the classification is not "arbitrary or capricious" and the equal protection clause is not violated. The statute may be invalid for some other reason but not because it conflicts with the Fourteenth Amendment.

What object does Missouri seek to accomplish by the challenged statute. Learned counsel for plaintiffs in their brief say that the statute was enacted "by reason of certain so-called discriminatory features in the laws of those states (Indiana, Pennsylvania, Massachusetts and Michigan) which the Legislature of Missouri believed to be harmful, not to the people as a whole, but to the brewers of Missouri who may desire to ship their products into Indiana, Pennsylvania, Massachusetts and Michigan." In his reply brief the Attorney General says: The object was "by all legitimate means at its (*i. e.*, the State's) command, to obtain a repeal of the hostile legislation (*i. e.*, hostile to Missouri manufacturers of intoxicating liquors) in the states which had adopted protective tariffs (license-fees upon importation of intoxicating liquors from Missouri and other states), and this method (*i. e.*, the challenged statute) was chosen by Missouri when, in 1937, faced by a rising tide of discriminatory legislation in other states, its General Assembly enacted the Anti-discrimination Act." Counsel for the parties are right. Obviously the object of this statute was to promote the interests of Missouri brewers and distillers, engaged in an important industry. The statute tends to accomplish that object in two ways: (a) by shutting off some competition from the Missouri field; (b) by offering an inducement to other states to withdraw barriers to the products of this Missouri industry sought to be imported into those states. It would be idle to deny that such is the object of the statute and such the means by which the object is sought to be accomplished.

It would be idle to deny that the object aimed at by this statute is one proper to be sought after by the state. Of course Missouri may legislate to promote the interests of any Missouri industry. *Barbier* v. *Connolly*, 113 U. S. 27, 31. The welfare of the people depends upon the success of the industries of the state. By promoting the interests of first one industry and then another the state protects and advances the welfare of all the people. One piece of legislation will be designed to benefit those engaged in agriculture, another to benefit those engaged in mining, another to benefit those engaged in manufacturing. Nor is the benefit of

any single piece of legislation confined to those who first receive it. What benefits the brewers, for example, benefits also those who labor in the breweries, benefits the farmers whose grains the brewers purchase, benefits the merchants patronized by those more directly benefited. Men reasonably might argue that what benefits any one great industry in a state benefits the whole people.

The question remains: May it be contended with any reason that this proper object of legislation will be promoted by the classification of this statute? But the question is not difficult. Who will deny that at least it can be argued with a show of reason that the Missouri statute will tend to induce Indiana, and Pennsylvania and Massachusetts and Michigan to remove the barrier they have put up to shut out the products of the Missouri brewers and distillers (as well as like products from other states)? The Missouri statute discriminates between the manufacturers of intoxicating liquors in Indiana and those, for example, in Georgia, but for no merely arbitrary or capricious reason (as the color of their hair or the fact that the name of one state begins with the letter "I" and the name of the other begins with the letter "G"). The Missouri statute discriminates against Indiana manufacturers in favor of those in Georgia because Indiana discriminates against Missouri manufacturers and Georgia does not. The discrimination is certainly bottomed on reason, not a price. It is bottomed on the same reason as supports those national laws which effectuate the raising and lowering of our tariffs against goods imported from foreign countries as they raise and lower their tariffs against American manufactured goods.

Conceding that the classification made in a statute is reasonably related to the object sought to be achieved by the statute, the statute must be held not to violate the equal protection clause. If the means (aside from the classification) by which the object sought to be achieved violates some provision of the Constitution other than the equal protection clause, that is a different matter. In *Truax* v. *Raich, supra*, the statute involved was held unconstitutional because the means whereby its object was sought to be achieved was inconsistent with the exclusive federal power over immigra-

tion and its incidents and not because the classification had no reasonable justification. Before the adoption of the Twenty-First Amendment the statute now before us would have been held invalid because its lawful object would have sought to have been achieved by a means violating the implied prohibition of the commerce clause. But no provision of the Constitution can be pointed to which this statute now violates either in its object or the means whereby the object is sought to be achieved.

The problem may appear simpler if we suppose that the Missouri statute does not absolutely prohibit the importation of intoxicating liquors from discriminating states but puts up exactly the same barriers (*i. e.*, license fees for importation) against the importation of intoxicating liquors from those states which they have put up against intoxicating liquors imported from Missouri and other states. Would it be said that Missouri cannot impose a license fee on intoxicating liquors imported from California which imposes a license fee on intoxicating liquors imported from Missouri, unless Missouri also imposes a license fee on intoxicating liquors imported from Texas which does not impose a license fee on intoxicating liquors imported from Missouri? Would it be said that Missouri cannot impose a license tax on Iowa automobiles using Missouri roads and exempt Illinois automobiles from the same tax, solely because Iowa imposes and Illinois does not impose a license tax on Missouri automobiles using their respective highways. The Supreme Court has said, at least by way of clear dictum, that the last mentioned distinction is valid. *Kane* v. *New Jersey*, 242 U. S. 160, 167. The two cases are identical in principle. But if Missouri can put up a hurdle against California which it is not required to put up against Texas, it can erect also an impassable barrier (complete prohibition) against California while allowing free ingress to importations of intoxicating liquors from Texas.

3. Since the submission of this case a three judge court for the Eastern District of Michigan in a similar case has reached the same conclusion as that indicated in this opinion. *Indianapolis Brewing Co.* v. *The Liquor Control Commission*, — Supp. —.

*Findings of Fact and Conclusions of Law.*

We find the facts to be as stipulated by the parties and conclude as a matter of law that the bills should be dismissed.

The Attorney General will submit appropriate forms of decrees.

Filed Feb. 23, 1938. A. I. Arnold, Clerk, by E. O. Keefe, Deputy.

(6927)

# Supreme Court of the United States,

OCTOBER TERM, 1938

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No. 252

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, and SCHENLEY DISTRIBUTORS, INC., Appellants,

*vs.*

ROY MCKITTRICK, Attorney General of the State of Missouri, et al.

---

No. 253

BEN BURK, INC. Appellant,

*vs.*

ROY MCKITTRICK, Attorney General of the State of Missouri, et al.

---

No. 254

JOSEPH E. SEAGRAM & SONS, INCORPORATED, and SEAGRAM-DISTILLERS CORPORATION, Appellants,

*vs.*

ROY MCKITTRICK, Attorney General of the State of Missouri, et al.

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No. 255

HINRICHS DISTILLED PRODUCTS, Appellant,

*vs.*

ROY MCKITTRICK, Attorney General of the State of Missouri, et al.

---

No. 256

ARROW DISTILLERIES, INC. Appellant,

*vs.*

ROY MCKITTRICK, Attorney General of the State of Missouri, et al.

---

## APPELLANTS' BRIEF

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---

**APPELLANTS' BRIEF**

## APPELLANTS' BRIEF

### Statement

These suits in equity were instituted October 20, 1937 in the United States District Court for the Western District of Missouri, Middle Division, to restrain the defendants, respectively the Attorney General and the Supervisor of Liquor Control of the State of Missouri, from enforcing the provisions of a Missouri statute (Laws of Missouri, 1937, pp. 536-543, both inclusive). (8)[1] As to the appellants in four of the causes, enforcement of the statute would prohibit them from importing into Missouri, under Missouri import licenses duly issued to them, alcoholic beverages manufactured in Indiana, Pennsylvania, Massachusetts and Michigan. As to the appellant in the fifth cause, a Missouri rectifier, enforcement of the statute would prohibit it from purchasing, receiving, possessing or selling any alcoholic liquor in Missouri manufactured in the same states. The ground upon which the suits were brought is that the statute in question violates various provisions of the Federal Constitution, notably Article I, Section 8, commonly referred to as the "Commerce Clause" and that, therefore, the attempted prohibitions are void.

The statute in question is hereinafter referred to as the "Missouri Retaliation Act." An inspection of its provisions shows that it is retaliatory in its purpose. (18)

On October 20, 1937 the District Court granted appellants temporary restraining orders. It set December 7, 1937 as the return date for the hearing of appellants' motions for preliminary injunctions before a three judge statutory court. Judicial Code, Sec. 266; 28 U.S.C.A. §380.

December 10, 1937, appellees moved to dismiss the complaints upon the ground that each did not state facts sufficient to constitute a cause of action. (66) The hearing on

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[1] All figures in parenthesis contained in this brief are, unless otherwise indicated, references to folios in the Transcript of Record.

these motions and the preliminary injunction motions was adjourned to January 10, 1938 and by stipulation of the parties it was agreed that the hearings upon these matters should be treated as a final hearing upon the merits, there being no dispute as to the facts involved in these cases. (68)

On February 23, 1938 the statutory court ruled the statute in question constitutional. It, therefore, denied appellants the injunctions prayed for and granted the appellees' motions for judgment dismissing the complaints. (107)

The lower Court's opinion is reported at 23 Fed. Supp. 244.

March 16, 1938 judgments in the five cases were entered in favor of the appellees dismissing the complaints. (70)

These appeals were taken on June 3, 1938. (76)

The jurisdiction of this Court to hear these appeals depends upon the Act of Congress of June 18, 1910, Ch. 309, Sec. 17, 36 Stat. 357; March 3, 1911, Ch. 231, Sec. 266, 36 Stat. 1162; March 4, 1913, Ch. 160, 37 Stat. 1013; February 13, 1926, Ch. 229, Sec. 1, 43 Stat. 936-938 (28 U.S.C.A., Sec. 380).

An order noting probable jurisdiction of these appeals was made by this Court October 10, 1938.

## FACTS

On April 8, 1937 the Governor of Missouri approved an Act of the Legislature, now known as the Missouri Retaliation Act (Laws of Missouri, 1937, pp. 536-543). The statute itself appears at pp. 11-20 of the Record. It is too long to be conveniently set forth here in full. A summary of its provisions here will be sufficient for this discussion.

By the provisions of the statute in question, certain exactions, prohibitions and restrictions imposed by the laws, rules or regulations of the several states upon the importation into such states of alcoholic liquors manufactured in Missouri are denominated discriminatory laws. (18) The statute requires the Attorney General of Missouri

to examine the laws, rules and regulations of the several states to determine whether there exists therein any such discriminatory laws as defined by the Missouri statute; and, if he finds such laws he is required, within thirty days of the effective date of the statute, to file a certificate with the Supervisor of Liquor Control of Missouri specifying the alleged discriminations contained in the laws of each of such states. The statute then requires the Supervisor of Liquor Control of Missouri to publish forthwith a notice advising all Missouri licensees of the filing of such certificates, listing therein the states in which discriminatory laws are found to exist by the Attorney General and stating that after forty-five days from the date of the publication of such notice it will be unlawful to import or transport into Missouri, or to purchase, receive, possess or sell any alcoholic liquor in Missouri which is manufactured in any state named in any of said certificates. A copy of this published notice is also required by the statute to be sent to each holder of a Missouri wholesale liquor license.

Section 4 of the statute then provides:

> "Importation of alcoholic liquor from state in which discrimination exists prohibited.
>
> "The transportation or importation into this state, or the purchase, sale, receipt, or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined."

The statute gives a right of appeal from the finding of the Attorney General and also provides that the provisions of the statute shall be deemed to be incorporated in every wholesale liquor license issued by the State of Missouri.

Acting in accordance with the direction of the statute, the Attorney General of Missouri on October 20, 1937 filed certificates with the Supervisor of Liquor Control of Mis-

souri, certifying that the states of Indiana, Pennsylvania, Michigan and Massachusetts were "states in which discriminations existed" as defined by the Missouri statute. (32)

Appellant Schenley Distributors, Inc., is a Delaware corporation. It maintains an office in the City of St. Louis, Missouri, from which it solicits orders from dealers in alcoholic beverages in Missouri for the products of The Old Quaker Company, whose distillery is located in Indiana, and Joseph S. Finch and Company, whose distillery is located in Pennsylvania. Schenley is and has been the holder and owner of a non-resident Missouri permit authorizing it to solicit orders from wholesalers duly licensed by the State of Missouri. Schenley has expended large sums of money advertising the products of the Finch and Quaker companies in Missouri. Since repeal there has been imported by the Schenley Company into the State of Missouri and sold therein in excess of $1,000,000 worth of alcoholic beverages produced at The Old Quaker Company distillery in Indiana and a like amount produced at the Finch Company distillery in Pennsylvania. (11-15)

Appellant Ben Burk, Inc., is a Massachusetts corporation and holds a Missouri non-resident license pursuant to which it imports and sells in Missouri various alcoholic beverages manufactured by it in the City of Boston, Massachusetts.

Appellant Seagram-Distillers Corporation is a Delaware corporation and under contract purchases from appellant Joseph E. Seagram & Sons, Inc., an Indiana corporation, its entire production and output of alcoholic beverages produced at its plant in Indiana. Seagram-Distillers Corporation has been, and is, the holder of a non-resident license issued by the Supervisor of Liquor Control of Missouri and under such license is authorized to solicit orders for the sale of alcoholic beverages in Missouri produced by

Joseph E. Seagram & Sons, Inc., at its distilling plant in Indiana.

Appellant Hinrichs Distilled Products is a Missouri corporation licensed to engage in the wholesale alcoholic beverage business by the State of Missouri. It imports alcoholic liquors from Indiana and rectifies and bottles them in Missouri for sale therein. It also has in storage in the State of Indiana a large stock of whiskey distilled in that state, which it will be unable to bring into Missouri for use in its business if the Missouri Retaliation Act is sustained.

Appellant Arrow Distilleries, Inc., is a Michigan corporation which operates in Missouri under a license pursuant to which it imports and sells in Missouri alcoholic beverages rectified by it at its plant in Detroit, Michigan.

All the appellants will be barred from importing their products into Missouri in interstate commerce in the event that the discriminatory prohibition provided for in the Missouri Retaliation Act is put into effect by appellees and is sustained by the Court as a proper exercise of power over the liquor traffic by the State of Missouri. They will suffer incalculable damage by reason of the loss of large markets and wiping out of their good will and business contacts in Missouri which they have built up at large expense and with much effort.

## QUESTION PRESENTED

The question presented is whether the State of Missouri, which recognizes wines, beers and spirituous liquors as articles of lawful consumption and commerce, may exclude from its borders such articles manufactured in certain states for the sole reason that those states discriminate against beer manufactured in Missouri, while admitting such articles produced in all other states.

Stated in constitutional terms, the question is whether the Commerce Clause has been altogether removed as a limitation on the power of the states to deal with the traffic in intoxicating liquors. For unless that clause is entirely gone the Missouri Retaliation Statute involved in these cases cannot stand. The court below faced that as the question and answered it in the affirmative on the ground that, with regard to intoxicating liquors, the Twenty-first Amendment had placed the Nation "again in the same situation in which it was as to all commerce before the adoption of the Constitution."

It is our position that the Commerce Clause has not been entirely destroyed, though, of course, it has been modified, by the Twenty-first Amendment and that, even as so modified, it invalidates the Missouri statute. In the development of our position we will discuss the invalidity of the statute apart from the Twenty-first Amendment for the purpose of showing its hostility to the basic character of the Union as manifested by the Commerce Clause; thereafter we will make and support the point that the statute is not saved by the Amendment. The interpretation of the Amendment which we urge is, we respectfully submit, the only interpretation justified by both the language and the purpose of the Amendment. Moreover, that interpretation, and the method suggested for its application, will not defeat the purpose of the Amendment but, on the contrary, will give room for its operation in a wide field. But before we come to the development of our position we believe we can put the problem in a clearer light and in a more sharply defined setting by first asking the Court to observe certain matters concerning the scope of the constitutional issue and its importance when measured by what is involved in it, and the fact that the issue is not foreclosed by any prior decision of this Court.

## Scope of the Constitutional Issue

The scope of the question can be more sharply drawn

by indicating what is *not* involved. It will be observed that the Missouri statute in question does not bar the importation of all liquors into the State of Missouri but only those manufactured in states which have laws found by Missouri's Attorney General to discriminate against alcoholic beverage manufacturers of Missouri. It permits the free flow of liquor into Missouri from certain states not under the ban of the Attorney General but bars liquors manufactured in other states. The Missouri statute is not related to the protection of the health, safety and morality of the people of Missouri as affected by the use of intoxicating liquors. It does not further the social welfare of the people of Missouri.

On the contrary, it is designed to influence legislation in certain states by economic pressure exercised upon a certain class of citizens of those other states. It is an economic weapon pure and simple—of a kind used by nations in international trade wars and of a kind common in the states prior to the adoption of the Federal Constitution. The Missouri statute is a plain act of economic retaliation by one state against another.

But the problem before the Court, to the extent that the Twenty-first Amendment is involved, *is still one of prohibition*. The prohibition question was not settled by the repeal of the Eighteenth Amendment: it was merely returned to the states. The repeal of the Eighteenth Amendment, of course, did put an end to one phase of the matter: it took Congress out of the internal and concurrent "police" area and it stopped the national experiment in the general prohibition field. But it was a prohibition problem which was returned to the states by the Twenty-first Amendment. In the interpretation of the Twenty-first Amendment, therefore, the social aspects of state power over intoxicating liquors (as distinguished from those of tariffs and trade rivalries) must be kept in view. The Twenty-first Amendment is as truly concerned with prohibition as was the

Eighteenth.

We do not suggest that any comprehensive definition be attempted as to what laws of the state are contemplated in the Twenty-first Amendment. We do suggest that the method for determining what laws are so contemplated is essentially the same as that in due process cases, namely, by the gradual process of inclusion and exclusion. We fully realize that the terms "dry" and "wet" furnish no sure criteria for determining which laws on the subject of intoxicating liquors must be respected by reason of the Amendment. Yet, we believe that they constitute helpful points of beginning. They were used frequently in congressional debate and elsewhere. Indeed, the history of Section 2 is written largely in terms of the struggle of "dry" states to ward off invasions from "wet" states. Surely a term of such wide and popular usage cannot be without some significance in this Court.

A "dry" state is distinguishable from a "wet" state, just as day is distinguishable from night, whatever may be the difficulty of drawing the line where one ceases and the other begins. At one extreme is the state, called "dry," which prohibits the manufacture, sale, or use of intoxicating liquors. At the other extreme is the state, called "wet," which undertakes no limits in the use and merely provides a licensing or other plan for the sale. In between, the situations may shade all the way from one extreme to the other. But in order for any state law to be within the scope and operation of the Amendment it must have some appreciable relationship to the promotion of the health, safety and morality of the people of the state as affected by the use of intoxicating liquors.

This is precisely the view taken by this Court with regard to the interpretation of the Wilson Act, the progenitor of both the Webb-Kenyon Act and the Twenty-first Amendment. *Scott* v. *Donald*, 165 U. S. 58 (1897) invalidated certain

features of the so-called dispensary law of South Carolina. The Court said that, so long as state legislation "continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles." (p. 91)

## Importance of the Constitutional Issue

Not only is it necessary that the Constitutional question thus presented to the Court in these cases be passed upon for the purpose of disposing of the instant litigation, but a case is here presented which requires determination for the purpose of clarifying the law in guiding the lower courts in their disposition of similar questions and placing before the public a concise statement as to whether the type of legislation here under attack is valid by reason of the provisions of the Twenty-first Amendment.

The interpretation of the Twenty-first Amendment given by the court below to the effect that we are today, with respect to intoxicating liquors, back in the same situation we were prior to the adoption of the Federal Constitution, will give fresh impetus to the expansion of the scope and extent of trade wars between the states. It will also cast doubt upon the whole Federal scheme of liquor control regulation enacted into law since the repeal of the Eighteenth Amendment. 27 U.S.C.A. §201-212.

If states are held to have full freedom to enact statutes such as those here challenged under the supposed effect of the Twenty-first Amendment, they will exercise it. This country is already witnessing a rise and spread of economic

nationalism along sectional and state lines.[2] The Court must decide whether the Nation again is in that same situation with respect to intoxicating liquor today in which it was as to all commerce before the adoption of the Constitution.[3] The Missouri retaliation Statute here challenged is both illustrative and suggestive. It shows the beginning of a widening circle. Indiana discriminates against a Missouri product—beer. Missouri retaliates by proscribing both beer and other Indiana products, namely, whiskey and other liquors. The retaliation thus spreads from beer to the whole field of intoxicating liquors but, practically, there is no reason why one state should limit its proscription to the field of intoxicating liquors. Under the ruling of the court below there would be nothing to prevent a great grain growing state's prohibiting the introduction of intoxicating liquors from any other state unless that state uses a given amount of grain from the first state, either in the manufacture of liquors or any other commodity, such as bread and the like. And it is possible to envision a situation where a state which manufactures bottles or barrels might prohibit the

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[2] This matter has been made the subject of "A Study in Economic Nationalism" with special attention given to state and local barriers to interstate commerce in the United States. The study was conducted by Dr. Frederick Eugene Melder and published in November, 1937, in the University of Maine Studies.

[3] The general nature of the state statutes during the period of the Articles of Confederation is thus stated in the study just cited: "These state-imposed restrictions and barriers had four different purposes in view: namely, retaliation against British restrictions on American shipping, acquisition of revenue for state treasuries, protection of domestic trade and industry, and discrimination or retaliation against commodities imported from neighboring states. The first three of these purposes were uppermost in the state commercial legislation during the early period of this era, but by 1785-1786 the regulations had been turned, in most if not all of the states, against the products, ships or merchants of sister states."

introduction of intoxicating liquors within its borders from all other states unless a quota, or possibly all, of such imported intoxicating liquors were marketed in locally produced bottles and barrels. There would seem to be no limitation upon the field in which such prohibitions might be made to operate. The importance of the attack upon the statute arises from the fact that the interpretation of the Twenty-first Amendment given by the court below in sustaining the statute would arm every state in the Union with an economic weapon to be used against those states which produce intoxicating liquors. From the point of view of those states the right to carry on interstate commerce in intoxicating liquors would be taken out of the Constitution and placed upon the auction block. There is something of sheer incongruity in the thought that while the United States is engaged, as a national policy, in endeavoring to compose differences and remove barriers in trade among the nations, the latest addition to our own Constitution should be interpreted by the lower court in such a manner as to make it possible for the states which make up our nation to throw up insurmountable trade walls and barriers against legitimate articles of commerce originating in sister states.

Nor is the issue presented here concerned solely with interstate traffic in alcoholic liquors and the economic interests of the appellants. The appellants are responsible members of the distilling industry and their economic interests are manifestly at stake; were the latter not so they might have no standing to complain of the Missouri statute. But we venture to suggest that something more is involved here: the public interest in the effective operation of the industry and its adequate control under the law. If the Twenty-first Amendment is to be construed in such a manner as to permit the erection of tariff barriers at state lines and the waging of trade wars among the states, fresh encouragement will be given to influences and agencies which in the past have flourished on extra-legal and unlawful practices. Bootlegging

will have been given a new start.

Even further and in a long view concerning matters less tangible but none the less real, the present issue touches a subject of wider public concern than the control of the liquor traffic. It tends to focus the minds of men on things that divide rather than those that unify. Animosities spring up and thrive and spread even where the division is on nothing broader than geographical lines. The world today furnishes abundant evidence of the animosities of division. In this country, it may be doubted whether any single provision of the Constitution has done as much as the Commerce Clause to forestall such animosities and to bring unity among the people of the states. No parochial philosophy underlies the Constitution; for "it was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in Union and not division."[4]

## Constitutional Issue Not Foreclosed by Any Prior Decision

No state statute whose aim is simply retaliation in the interstate commerce field has ever, so far as we have been able to ascertain, been upheld by this Court. *State Board of Equalization* v. *Young's Market Company*, 299 U. S. 59 and *Mahoney* v. *Triner Corporation*, 304 U. S. 401 are not to the contrary. Both of those cases were concerned with statutes quite different from the Missouri Retaliation Statute involved here and neither of them is controlling in these cases.

Of the two only the *Young's Market Case* was concerned with a Commerce Clause objection to the state statute. In sustaining the statute, this Court pointed out that "the case does not present a question of discrimination prohibited by the Commerce Clause" (p. 62). Moreover, as the Court added, "in the light of history, we cannot say that the exaction of

[4] Mr. Justice Cardozo in *Baldwin* v. *Seelig*, 294 U. S. 511, 523.

a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing liquor traffic" (p. 63).

The *Tvriner Case* was decided on the sole contention that the state statute violated the equal protection clause. It is true that in the course of the opinion and in answer to the contention that "registered brands of other foreign manufacturers may be imported while its unregistered brands may not be, although 'identical in kind, ingredient or quality,'" the Court said "we are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic," and declined to do so, citing the *Young's Market Case*. But, aside from the fact that the Commerce Clause was not argued and hence was not a basis for the decision, we suggest that a similar statement to that made by the Court with reference to the California statute (in the *Young's Market Case*) might well be made with regard to the Minnesota statute (in the *Tvriner Case*), namely, that the state statute involved might, for all that was disclosed on the record and in history to the contrary, conceivably have been one in aid of policing the liquor traffic.

## POINTS AND AUTHORITIES

### I

**Apart from the Twenty-first Amendment, the Missouri Retaliation Statute here involved violates the Commerce Clause of the Federal Constitution.**

Constitution, Art. I, Sec. 8.

Farrand, Records of the Federal Convention, Vol. II, p. 308; Vol. III, pp. 478, 547, 548.

The Federalist, No. XLII.

Curtis, History of the Constitution, Vol. I, p. 502.

Story on the Constitution, Sec. 259.
*Baldwin* v. *Seelig*, 294 U. S. 511.
*Cooley* v. *Board of Wardens*, 12 How. 299.
*South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177.
*The License Cases*, 5 How. 504.
*Bowman* v. *Chicago, etc. Ry. Co.*, 125 U. S. 465.
*Leisy* v. *Hardin*, 135 U. S. 100.
*Gibbons* v. *Ogden*, 9 Wheat. 1.
*Brown* v. *Maryland*, 12 Wheat. 419.
*Mugler* v. *Kansas*, 123 U. S. 623.
*In re Rahrer*, 140 U. S. 545.
*Scott* v. *Donald*, 165 U. S. 58.
*Rhodes* v. *Iowa*, 170 U. S. 412.
*Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311.
*State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59.
Wilson Act, 27 U.S.C.A., Sec. 121.
Webb-Kenyon Act, 27 U.S.C.A., Sec. 122.

## II

**The Missouri Retaliation Act involved in these cases is not saved by the Twenty-first Amendment. Nothing contained in that amendment validates such a statute as this nor gives to the States unlimited power to burden interstate commerce in intoxicating liquors.**

Constitution, Twenty-first Amendment.
*Knowlton* v. *Moore*, 178 U. S. 41.
*Evans* v. *Gore*, 253 U. S. 245.
*Selective Draft Law Cases*, 245 U. S. 366.
*Butler* v. *Perry*, 240 U. S. 328.
*Robertson* v. *Baldwin*, 165 U. S. 275.
*Slaughter House Cases*, 16 Wall. 36.
*Brown* v. *Maryland*, 12 Wheat. 419.

*Baldwin* v. *Seelig*, 294 U. S. 511.
*Rhodes* v. *Iowa*, 170 U. S. 412.
*Leisy* v. *Hardin*, 135 U. S. 100.
*Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311.
*In re Rahrer*, 140 U. S. 545.
*Scott* v. *Donald*, 165 U. S. 58.
*McCormick* v. *Brown*, 286 U. S. 131.
*Samuels* v. *McCurdy*, 267 U. S. 188.
*United States* v. *Hill*, 248 U. S. 420.
Constitution, 18th Amendment.
*Commonwealth* v. *Stofchek*, 185 Atl. 840.
Wilson Act, 27 U.S.C.A., Sec. 121.
Webb-Kenyon Act, 27 U.S.C.A., Sec. 122.
49 Cong. Rec. 699.
S. J. Res. 211, 72nd Cong., 2nd Session.
76 Cong. Rec. 4170-4176.
Brown, Ratification of the Twenty-first Amendment.

## ARGUMENT

### I

### Apart from the Twenty-first Amendment, the Missouri Retaliation Statute here involved violates the Commerce Clause of the Federal Constitution.

*A. The Unwarranted Discriminations.*

Article I, Sec. 8, of the Federal Constitution provides:

> "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The principal object sought to be attained by this provision of the Federal Constitution was the elimination of provincial barriers burdening commercial intercourse among the thirteen original colonies. History is replete with evi-

dence that the narrow and provincial restrictions erected by the various colonies against the importation of commodities moving in commerce from the sister colonies brought about as between them an unhealthy and undesirable situation.

Farrand, Records of the Federal Convention, Vol. II, p. 308; Vol. III, pp. 478, 547, 548;
The Federalist, No. XLII.
Curtis, History of the Constitution, Vol. I, p. 502;
Story on the Constitution, Sec. 259;
See also; Footnote 3, supra; p. 11.

Uniformly the Commerce Clause has been construed as prohibiting to the States the power to discriminate against commodities having their origin in sister states and moving in interstate commerce. As recently summarized by the Court, the clause "by its own force, probibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." Underlying the stated rule, the Court added, "has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the State."[5] It is in this area of discrimination that the indispensable function of this Court comes into play to provide a check against state action where the normal processes of political pressure are not calculated to provide a corrective.

[5] *South Carolina State Highway Department* v. *Barnwell Brothers*, 303 U. S. 177.

Turning to the statute here challenged, we find by an examination thereof that the State of Missouri attempts to allocate to itself, in violation of constitutional principles which have obtained for many years, the power to determine the states of origin of intoxicating liquors which may or may not be brought within its borders. The sole test upon which admission or exclusion depends is whether the laws of the several states of origin comply or fail to comply with Missouri's definition of what it chooses to call discrimination.

Clearly, then, the statute is retaliatory and is of the type which would be prohibited under the Commerce Clause of the Federal Constitution except, as the lower court held, for the provisions of the Twenty-first Amendment. The effect of the lower court's decision is to bring back an evil long sought to be eradicated from our national life. The evil referred to is the practice, long condemned, of the liquor interests engaging in local politics.

There are eighteen states in the Union which have enacted laws that might be characterized under the Missouri statute as discriminatory. Doubtless Missouri producers hoped that by the enactment of the challenged statute and the consequent exertion of economic pressure upon the producers of intoxicating liquors within the offending states, they would cause the latter to bring about repeal of the supposed discriminatory statute in each of those eighteen states.

The result, however, was not as hoped for. Instead, legislation similar to the Missouri statute was introduced in the legislatures of eight other states. In only one other state, Michigan, was this type of legislation enacted. If, however, the power to enact this type of legislation with respect to intoxicating liquors is conceded to the states, an intolerable situation with respect to retaliation will arise, though to date reason has prevailed to keep this result at a minimum.

The chaotic situation which will result from the attempt of the states to regulate, in violation of the provisions of the Federal Constitution, the liquor traffic moving into their borders in the course of interstate commerce may be appreciated from an address made by Captain Alexander, Administrator of the Federal Alcohol Administration to the National Conference of State Liquor Administrators at their annual convention held at Mackinac Island in 1937. Speaking of such measures as that now before the Court, Captain Alexander said:

> "Such measures in the long run will be productive of conditions which tend toward chaos and will give rise to further and more violent measures on the part of other states affected thereby."

The discriminations arising from the Retaliation Statute do not, it should be noted, depend upon the quality of the products prohibited; nor do they depend upon a valid attempt to regulate or limit the total amount of liquor which may be imported into the State of Missouri; nor the imposition of any valid license or inspection fee upon the importation of appellants' intoxicating liquors. The discriminations are made to depend only upon the provisions of laws of other states as they relate to alleged burdens upon the importation into those states of intoxicating liquors manufactured in Missouri.

The type of state legislation with which we are here dealing was recently held invalid by this Court in *Baldwin* v. *Seelig*, 294 U. S. 511. While the New York statute in that case did not deal with intoxicating liquors moving in interstate commerce, the parallel between that case and the one at bar is too striking to be disregarded. In that case the constitutionality of the New York Milk Control Act (New York Laws of 1933, Ch. 158; Laws of 1934, Ch. 126) was challenged on the grounds, first, that it imposed an undue burden upon interstate commerce beyond the constitutional powers of the State of New York, and, second, that

it deprived the milk dealer in question of its property without due process of law. The statute, and the regulations adopted pursuant to it, undertook to prevent the sale of milk within the State of New York, brought in from other states, unless the price paid to the producers of the milk was one that would be lawful upon a like transaction within the State of New York. The argument presented to sustain the statute was that as well as providing for the economic welfare of the farmers of the state it served to assure the maintenance of a regular and adequate supply of pure and wholesome milk otherwise in jeopardy when the farmers of the state were unable to earn a living income. Coupled with this argument was one that farmers producing milk outside the state who did not receive an adequate price for their product were subject to the temptation to relax the rigid sanitary standards necessary to the production of a pure and wholesome supply of milk in the interest of personal economy.

Mr. Justice Cardozo, applying the constitutional tests by which such arguments are to be measured when attempt is made to bring such statutes within the power of the state, said at p. 521:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the Constitution, beyond the power of a state, 'except what may be absolutely necessary for executing its inspection laws.' Constitution, Art. I, §10, clause 2; *Woodruff* v. *Parham*, 8 Wall. 123. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, §8, clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' *International Textbook Company*

v. *Pigg*, 217 U. S. 91, 112; and see *Brennan* v. *Titusville*, 153 U. S. 289; *Brown* v. *Houston*, 114 U. S. 622; *Webber* v. *Virginia*, 103 U. S. 344, 351; *Kansas City Southern Railway Company* v. *Kaw Valley Drainage District*, 233 U. S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. *They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis.*" (Emphasis ours)

*B. Limitations on the Police Power.*

The object of retaliation against the laws of other states is not one which has ever been considered within the legitimate scope of the police powers reserved to the states. While the Commerce Clause has never been construed to be an absolute curb upon the powers of the states to enact laws pertaining to the health, safety and morals of their citizens, it has always been insisted that any state law affecting interstate commerce be enacted with some such object in view. Moreover, the effect upon interstate commerce must be neither unreasonable nor direct but merely incidental, and the regulation must pertain to matters of purely local concern upon which Congress has not seen fit to legislate.

In *The License Cases*, 5 How. 504, decided 1847, provisions of statutes of Massachusetts, New Hampshire and Rhode Island requiring persons importing wines from France and gin (in the case of New Hampshire) from Massachusetts to have licenses for that purpose were upheld. The statutes were attacked on the ground that they conflicted with the Commerce Clause of the Federal Constitution. The Court held that the statutes were mere internal regulations of the respective states, and, hence, were not passed in an attempt to regulate interstate commerce.

Here for the first time the power of the states to regu-

late the traffic in intoxicating liquors was called into question under the Commerce Clause. In this first test, nothing was decided except that the exercise of power questioned did not conflict with the Commerce Clause.

The next important case was *Bowman* v. *Chicago, etc., Railway Company*, 125 U. S. 465, decided in March, 1888. There plaintiffs claimed that under the Commerce Clause of the Federal Constitution an Iowa statute was void which forbade a common carrier to transport intoxicating liquors from outside the state into Iowa unless the shipper had first filed with the carrier a certificate showing he was authorized to sell intoxicating liquors in Iowa. The statute was held unconstitutional as an encroachment upon the power of Congress over interstate commerce. Chief Justice Field, writing for the Supreme Court in this case, stated:

> "* * * Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted."

Next, on April 28, 1890, came *Leisy* v. *Hardin*, 135 U. S. 100. The plaintiffs claimed that the Commerce Clause of the Constitution voided an Iowa statute which authorized the seizure of beer shipped to them in Iowa in interstate commerce from Peoria, Illinois. The Court upheld this contention upon the authority of *Gibbons* v. *Ogden*, 9 Wheat. 1 and *Brown* v. *Maryland*, 12 Wheat. 419. Chief Justice Fuller, writing for the Court, in speaking of the power to regulate commerce, declared at p. 108:

> "And while, by virtue of its jurisdiction over persons and property within its limits, a State may pro-

vide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confined exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by Congressional action."

And again, at p. 109:

"Hence inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled."

C. *Efforts to exempt intoxicating liquors from protection of Commerce Clause and the result thereof.*

The foregoing decisions demonstrate that up to 1890 state statutes prohibiting the importation of alcoholic beverages from outside the state were clearly unconstitutional as unreasonable burdens upon interstate commerce despite the fact that they were enacted pursuant to the police powers reserved to the states. A reading of these decisions and others, notably *Mugler* v. *Kansas*, 123 U. S. 623, demonstrates the struggle which had been going on for many years between the states in which sentiment was predominantly opposed to the liquor traffic and the Commerce Clause of the Federal Constitution in connection with the efforts of the former to prevent the importation of alcoholic liquors within their borders in furtherance of their own local prohibition policy. Up to this time, whenever the local "drys" persuaded their respective legislatures to enact laws in the furtherance of their objectives which encroached upon the power of Congress to regulate interstate commerce, this Court steadfastly adhered to the maintenance of the supremacy of the Federal power over interstate commerce and struck down as unconstitutional state

enactments found to conflict with that power.

The "dry" forces of the country, therefore, ultimately realized that state power effectively to prohibit the importation of liquor into the states which they controlled must impinge upon the commerce clause. They also realized that such power could only be obtained for the states by a relaxation of the effect of that clause. Hence they determined to take action to achieve their ends.

As a result, there was introduced in Congress in 1889 a bill known as the Wilson Bill. This bill was not passed, however, until August 8, 1890, several months after this Court's decision in *Leisy* v. *Hardin*, supra. The Court's suggestion in that decision to the effect that the solution of the problem was to have the Federal Government surrender to the states some part of its power to regulate interstate commerce was probably influential in bringing about the enactment of the Wilson Act in its final form. 27 U.S.C.A. §121. The text of the Wilson Act appears on p. 35.

This statute was the beginning of the process by which the Federal Government, in furtherance of its policy to permit the states to exercise their customary police powers with respect to the liquor traffic unhampered by the curbs which had previously been imposed upon the exercise of such powers, relinquished to such extent only its control over interstate commerce in intoxicating liquors.

The Act was declared constitutional by this Court and was held to give the states control of intoxicating liquors moving in interstate commerce upon their arrival in the hands of the consignees within the states.

*In re Rahrer*, 140 U. S. 545.

The Act, however, was not construed as being a complete surrender by Congress of its power to regulate the interstate traffic in alcoholic beverages. That power had been surrendered only to the extent necessary to allow the states free rein in the legitimate exercise of their police

powers with respect to interstate traffic in liquor. As was pointed out above in the discussion of the recent case of *Baldwin* v. *Seelig*, 294 U. S. 511, discrimination against the products of sister states is not an objective within the proper scope of the police powers reserved to the states. Accordingly, when South Carolina sought, pursuant to the Wilson Act, not to prohibit absolutely the importation of liquors as articles detrimental to the public welfare, but merely to prohibit the importation of liquors by others than state functionaries, the statute was declared to constitute an unlawful discrimination against the products of other states and so to be unconstitutional. *Scott* v. *Donald*, 165 U. S. 58, 100 (1897). By failing to prohibit absolutely the importation of all liquors, the legislature had recognized liquors as subjects of legitimate commerce. Nor had the prohibition against importation been made to depend on the purity or impurity of the liquors. The only objective to which the regulations could conceivably relate was discrimination against the liquors imported from other states, and this was not a legitimate subject for exercise of the police powers. And the Wilson Act, intended only to permit an unrestrained exercise of the police powers, did not save the statute. The remarks of Mr. Justice Shiras, speaking for the Court, are emphatic on this point (p. 100):

> "It is not a law purporting to forbid the importation, manufacture, sale and use of intoxicating liquors, as articles detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890 [the Wilson Act]."

The "dry" battle had not as yet been won, however. The interpretation accorded the Wilson Act by this Court was not regarded as having sufficiently vested the states with control over the interstate shipment of alcoholic beverages. State prohibition had become quite a common thing after the enactment of the Wilson Act. In those states where pro-

hibition existed locally, difficulty was found in coping with the traffic in alcoholic beverages moving in interstate commerce. The Wilson Act had been so construed by the Court as to prevent the police power of the state from attaching to alcoholic beverages moving in interstate commerce until actual delivery of such alcoholic beverages to the consignee within the state whose laws sought to control such commodities.

*Rhodes* v. *Iowa*, 170 U. S. 412;

The result of this condition was that in 1913 Congress enacted the Webb-Kenyon Act. 27 U.S.C.A. §122. The purpose of this Act was to give to "dry" states, under certain circumstances, the power to control shipments of alcoholic beverages moving in interstate commerce while within their borders in accordance with their general prohibition policy. The text of the Webb-Kenyon Act appears on p. 35.

The constitutionality of the Webb-Kenyon Act was upheld by this Court in *Clark Distilling Company* v. *Western Maryland Railway Company*, 242 U. S. 311. An examination of the opinion of Chief Justice White in that case discloses that the purpose of the Act was to permit "dry" states to exercise the power to keep outside their borders intoxicating liquors which they had theretofore been unable to do because of the conflict with the Commerce Clause of the Federal Constitution.

Thus, the situation which existed under the Wilson Act, as set forth above in *Scott* v. *Donald*, 165 U. S. 58, 100 (1897), was not altered in the slightest by the enactment of the Webb-Kenyon Act, which, by its title, divested intoxicating liquors of their interstate character *in certain cases* (emphasis ours). Its only effect was to enable the states to exercise their police powers with respect to imported liquors still in the process of shipment as well as after reaching the consignees. *It did not undertake completely to divest intoxicating liquors of all protection under the Commerce Clause so as to legalize state regulation of im-*

*ports for purposes other than those within the proper scope of the police powers.* (See further, as to the legislative purpose of the Act, p. 37, fu.) That it was not the intention of Congress in enacting the law to do so, is manifest by this Court's decision in the *Clark* case, supra, wherein it was stated by Chief Justice White that the Act was to operate "so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling."

The intention of Congress was, therefore, to grant to the "dry" states the power to suppress the liquor traffic within their own borders under their police powers if they so chose, without the embarrassment of the bar of the Commerce Clause which had theretofore stood in the way of their accomplishing this result.

This continued to be the state of the law until the effective date of the Eighteenth Amendment to the Constitution. Then the liquor traffic became entirely prohibited as a matter of national policy.

This Court in *State Board of Equalization* v. *Young's Market Company,* 299 U. S. 59, declared that apart from the provisions of the Twenty-first Amendment to the Federal Constitution a statute of California imposing a greater license fee upon wholesale beer dealers for the privilege of handling imported beer than that imposed for the handling of domestic beer would create a direct burden on interstate commerce and would, therefore, be void. It requires little argument to show that the same result would necessarily follow as to the statute here challenged which arbitrarily discriminates against and prohibits the importation into the State of Missouri of liquors manufactured in certain states because Missouri sees fit to characterize the laws of those states discriminatory and not because Missouri in prohibiting such importations is attempting to further the social or economic welfare of its citizens under its admitted police power. No purpose is apparent in the statute to promote the public health, safety or morals of the citizens of Mis-

souri. No pretext is offered that the enactment falls within the state's power to protect the life, limb, or property of its citizens.

Conceding to Missouri the power attempted to be exercised concedes that it may, despite constitutional prohibition, levy such imposts, obstructions and burdens upon the interstate commerce in intoxicating liquors as it sees fit. It is not an enactment, as clearly appears from its face, to curb, regulate or prohibit the liquor traffic in Missouri. No purpose is apparent from the statute itself, or from anything else made to appear on the record, that the importation into Missouri of intoxicating liquors will in any way be decreased by the operation of the statute. Liquors, manufactured in states upon which the ban of the statute does not fall, may flow into Missouri as freely as before and from aught that appears may flow more freely to take up the slack created by the prohibition placed upon the states in which discriminations are said by Missouri to exist. Rather, the statute represents a long step back toward that destructive commercial strife among the various states which the Commerce Clause of the Constitution was designed to eliminate.

The foregoing discussion clearly demonstrates that apart from the Twenty-first Amendment the statute here challenged is an unconstitutional attempt by the State of Missouri to bar intoxicating liquors from its borders based solely on retaliation. We now proceed to demonstrate that the statute is not saved by the Twenty-first Amendment.

## II

**The Missouri Retaliation Act involved in these cases is not saved by the Twenty-first Amendment. Nothing contained in that Amendment validates such a statute as this nor gives to the States unlimited power to burden interstate commerce in intoxicating liquors.**

It is our position that the Twenty-first Amendment cannot properly be construed as restoring the states to the position they occupied prior to the adoption of the Constitution and as thus removing the Commerce Clause *in toto* as a limitation upon their powers to deal with interstate commerce in intoxicating liquors. Affirmatively, it is our position that the effect of the Amendment upon the powers of the states over interstate commerce in intoxicating liquors is coextensive with the effect of the Webb-Kenyon Act and that it establishes in the Constitution itself the powers available to the states under that Act in furtherance of the prohibition policies of states. Properly construed, the Amendment imparts no validity to the Missouri statute here involved.

In endeavoring to support that position we invoke the time-honored method of this Court in interpreting the Constitution, namely, to give full consideration not only to the language but also to the purpose of the provision in question.[6] Conformably to that method we will divide our argument on the effect of section 2 of the Twenty-first Amendment into two parts concerned, respectively, with the language of the section and with the purpose for which those words were added to the Constitution. The two parts are not wholly distinct, but such overlapping as may arise will not interfere with their separate presentation.

A. *The language of the Twenty-first Amendment*

It is with section 2 that we are principally concerned

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[6] "The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning."—White, J., in *Knowlton* v. *Moore*, 178 U. S. 41, 95 (1899). "This rule is as applicable to the Amendments as to the provisions of the original Constitution."—Van Devanter, J., in *Evans* v. *Gore*, 253 U. S. 245, 260 (1920).

and it reads as follows:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The words of this section do not permit the construction that transportation of intoxicating liquors into a state contrary to "*any*" law of the state is prohibited. A limitation in respect of the kind of laws involved appears on the face of the section itself. The section, it will be noticed, does not say that transportation of intoxicating liquors into a state in violation of the laws thereof is prohibited. What it does say is that transportation of intoxicating liquors into a state "*for delivery or use therein*" in violation of the laws thereof is prohibited. The words "for delivery or use" cannot be ignored. They must be given effect. It is, then, the laws of a state with regard to delivery and use which are in the contemplation of the Amendment. "Delivery" and "use" thus become pivotal words in the construction of the Amendment. If it be thought that they are all-inclusive (that no transportation can be conceived of which does not involve either delivery or use) the reply is that they have acquired a meaning in the course of the long struggle over prohibition and that the Amendment must be read in the light of those meanings. What those meanings are will be developed more fully in a later part of this brief (p. 40). It is enough to suggest here that they are concerned with the social aspects of the traffic in intoxicating liquors and have no relationship to traffic and trade rivalry aspects.

Even if it be assumed that the words of section 2 are broad enough to prohibit the transportation of intoxicating liquors into a state contrary to "*any*" law thereof without regard to the character or purpose of that law, it does not follow that such a broad effect can be given to the Amendment. However comprehensive the words of an Amendment may be, it is settled that the effect of the Amendment may be less comprehensive, dependent upon the purpose for

which it was designed and adopted. Exceptions must be carved out of the comprehensive coverage, when the history of the Amendment shows them not to be within its purpose. It would be difficult to find more sweeping language than the words of the Thirteenth Amendment prohibiting involuntary servitude. Yet, notwithstanding the fact that the Amendment itself carried an express exception,[7] other exceptions were implied so as not to destroy historical powers and practices not deemed to be within the evils aimed at by the Amendment. Thus involuntary servitude has been enforced in the armed forces of the nation, *Selective Draft Law Cases*, 245 U. S. 366 (1918); on public highways of a State, *Butler* v. *Perry*, 240 U. S. 328 (1916); and on privately owned ships, *Robertson* v. *Baldwin*, 165 U. S. 275 (1897).

The rule for implying these historical exceptions is especially applicable when not to imply them will work a substantial change in the general scheme of government under the Constitution as a whole. In the *Slaughter House Cases*, 16 Wall. 36 (1873), this Court, while admitting that the argument is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument, declared that when the consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions as to radically change the theory of the relations of the State and Federal Governments to each other and of both to the people, the argument has a force that "is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt." (p. 78).

The "oppressed and degraded state of commerce previous to the adoption of the Constitution" was noted by this Court long ago. And it may be doubted, said Chief

[7] "except as a punishment for crime whereof the party shall have been duly convicted."

Justice Marshall, "whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." *Brown* v. *Maryland*, 12 Wheat. 419, 445 (1827).

More recently, when one state sought to establish a barrier against the products of a sister state, this Court struck the barrier down, saying that the Constitution "was framed under the dominion of a political philosophy less parochial in range" than would justify such state action. It was, moreover, declared to be "ultimate that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *Seelig*, 294 U. S. 511 (1935).

In the light of these principles of construction, and with these fundamental objectives of the Constitution, especially as illustrated by the Commerce Clause we turn to the purpose of the Twenty-first Amendment as showing that the second section thereof cannot be rightly construed as bringing about the result on the basis of which this case was decided below, namely, that so far as intoxicating

liquors are concerned "the nation again is in that same situation in which it was as to all commerce before the adoption of the Constitution."

B. *The purpose of the Twenty-first Amendment*

The purpose of Section 2 was to write into the Constitution the effect of the Webb-Kenyon Act and thus furnish a permanent basis upon which "dry" states could protect themselves against the inflow of intoxicating liquors. This becomes clear from a consideration of the history of the Amendment and its relationship to the liquor problem with which the country has struggled for at least half a century. More particularly, the proof is established by a consideration of the evils which led up to and called the Amendment forth and which it was designed to correct; the origin and legal effect of the language in which it was framed; the ends for which it was submitted by Congress; the expectations with which it was received in public opinion and the purposes for which it was ratified by conventions in the states. The first and second of the matters of proof just mentioned will be considered together, inasmuch as the origin of the languag is to be found in the legislative efforts to deal with the evils which antedated the Twenty-first Amendment.

1. *Antecedent evils—Origin of language of Section 2.*

The Webb-Kenyon Act is the predecessor, if not precisely the prototype, of Section 2 of the Twenty-first Amendment. Its legislative history is illuminating. The avowed purpose of the Webb-Kenyon Act in 1913 was to carry a step further what Congress had undertaken to do in the Wilson Act in 1890, namely, to enable "dry" states to protect themselves against the inflow of liquors, particularly from "wet" states. *Rhodes* v. *Iowa*, 170 U. S. 412 (1898), in holding that "arrival" in the Wilson Act meant "delivery to the consignee," had opened the gates for a

flood of liquors to pour into "dry" states in the form of mail order and express shipments direct to the consignees. Delivery to the consignee thus being deemed to be within the protection of the Commerce Clause and untouched by the Wilson Act, new pressure was put on Congress by the prohibition forces to remove this protection also. All of which produced the passage of the Webb-Kenyon Act. There can be no question but that this matter of delivery in "dry" states was the specific evil with which Congress was dealing. And "delivery" (as has already been noted, p. 30) is one of the two pivotal words employed in Section 2 of the Twenty-first Amendment.

But though the purpose of the Webb-Kenyon Act was to carry the Wilson Act a step further, it was framed in terminology altogether different from the Wilson Act. For convenience in comparison, the two Acts are printed here in parallel columns:

*Wilson Act*

26 Stat. 313, 27 U.S.C. 121

August 8, 1890

"An Act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases.

"All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

*Webb-Kenyon Act*

37 Stat. 699, 27 U.S.C. 122

March 1, 1913

"An Act divesting intoxicating liquors of their interstate character in certain cases.

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The Wilson Act, it will be noted, is of unusual statutory form. It prescribes no rule of conduct. It imposes no duty. It provides no penalty. It was the method by which Congress undertook to give effect to the suggestion made in *Leisy* v. *Hardin*, 135 U. S. 100 (1890) that the reason Iowa could not, in that case, stop the sale of intoxicating liquors in original packages was because Congress had not given its consent for such state action. The declaratory language of the Wilson Act was Congress' consent to the states to apply their own prohibition laws to intoxicating liquor from other states notwithstanding that it was still in the original package. The Wilson Act thus constitutes an example of consent given by Congress for state action.

The Webb-Kenyon Act, on the contrary, is a prohibitory act. Unlike the Wilson Act, the text of the Webb-Kenyon Act is a direct prohibition by Congress of inter-state transportation of intoxicating liquors in certain circumstances. But there is not the slightest doubt that Congress in passing that Act intended to put "dry" states in a position to protect themselves against incoming liquors. The steps by which it was decided to employ the prohibitory language in the Webb-Kenyon Act rather than the consent language of the Wilson Act presents a striking case of legislative action built largely on a single word—the word "divest"—used by this Court in sustaining the Wilson Act.[8]

The original Senate Bill which became the Webb-Kenyon Act contained two sections. The first section survived as the total text of the Act.[9] The second, which was framed

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[8] "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."—*In Re Rahrer*, 140 U. S. 545, 562 (1891).

[9] Technically there was a slight change in Section 1. Just before the final passage of the Bill in the Senate, the text of the companion Bill which had been perfected and passed by the House was substituted for the language of the Senate Bill. This substitution accomplished two things: it brought about the perfecting amendments which the Senate desired to include and it expedited the acceptance of the Senate Bill by the House.

along the lines of the Wilson Act was killed in the Senate. The two sections were complementary: In the first, Congress proposed to exercise its power to throw a protection around "dry" states; and in the second, Congress proposed to give its permission (in the language of the Wilson Act already approved by the Court) to the states to protect themselves. Strangely enough, the Senate appeared to be of the opinion that Section 2, even though it followed the Wilson Act, went too far in its enabling effect and might be held invalid as a delegation of power.[10] So that section was killed.[11] Then something happened to the title of the Bill. The original title was "A Bill to prohibit interstate commerce in intoxicating liquors in certain cases," but on a motion by Senator Gallinger it was amended to read, "A Bill divesting intoxicating liquors of their interstate character in certain cases." With that title, and with only the text contained in the original first section, the Bill was accepted by the House. It was vetoed by President Taft on

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[10] 49 Cong. Rec. 702 and passim.

[11] There appears to be no basis for the contention, sometimes made, that the reason for the abandonment of the section modelled after the Wilson Act was in order to enable the states to discriminate at will against other states. The Wilson Act provided that a state could exercise its police powers against out-of-state liquors "in the same manner as though such liquids or liquors had been produced in such State." The purpose of the Act was to break down the distinction between in-state and out-state liquors. No doubt it was assumed, if not actually intended, that equality or uniformity of treatment would follow. See *Scott* v. *Donald*, 165 U. S. 58, 100 (1897). And the Court has emphatically declared that "the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Act are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other."—White, C. J. in *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 330 (1917).

the basis of an opinion by the Attorney General that it involved an unconstitutional delegation of legislative power to the states;[12] but it was repassed by both Houses and became law on March 1, 1913.

The Webb-Kenyon Act, then, by its title is a "divesting" statute and by its text a congressional prohibitory statute. And in the *Clark Case* it was said that the movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law had been "in express terms divested by the Webb-Kenyon Act of their interstate commerce character."[13] In such fashion was the theory of the Wilson Act, crystallized in the word "divest" in the *Rahrer Case*, carried over via the title into the Webb-Kenyon Act and sustained by the Court. In substantial effect, the expanded operation of the Wilson Act had been secured notwithstanding the expunged second section of the Webb-Kenyon Bill. At last the states were enabled to stop the incoming flow of liquors—to stop it at the borders if that were deemed necessary in order to check the "wet" invasion of "dry" states.

From the point of view of the states, their power of self-protection was established by the Webb-Kenyon Act as interpreted and sustained in the *Clark Case*. But from their point of view also, it is necessary to keep two other things in mind. First, their self-protective power rested, not on the firm and permanent basis of constitutional authority, but on the consent of Congress; and the consent which Congress had given by statute, Congress could take

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[12] 49 Cong. Rec. 4291.

[13] Nowhere was there a suggestion that the process of "divesting" had removed intoxicating liquors altogether from the protection of the Commerce Clause. The title of the Webb-Kenyon Act was limited to divesting "in certain cases." "Divest," as shown by its use in the *Rahrer* case, was merely a figurative way of expressing the legal result that Congress had given its consent to the states to apply their "police" laws to incoming out-of-state liquors.

away. Second, the constitutional foundation of the Webb-Kenyon Act was itself not beyond dispute: the Attorney General had rendered an opinion against its validity; the President had vetoed it on the ground that it was unconstitutional; the Court had been divided in sustaining it.

The Eighteenth Amendment did not affect this situation. It neither repealed nor impaired the operation of the Webb-Kenyon Act. *McCormick & Co.* v. *Brown*. 286 U. S. 131 (1932). It left the states with their powers intact over intoxicating liquors except, of course, that they could not affirmatively legalize the traffic.

Along with the movement against the Eighteenth Amendment there grew the conviction that repeal should be accompanied by some provision for protection of the states. It found expression in the 1932 platforms of the two principal political parties, both of which coupled repeal with the protection of the states. (See Appendix, p. 20).

The Twenty-first Amendment originated in the Senate, and some of the Senators who participated in the passage of the Webb-Kenyon Act participated in the debate on the Twenty-first Amendment—notably Senator Borah. The senatorial debate on the submission (noted and discussed later, p. 42 et seq.) leaves no room for doubt that the Senate was concerned with the same problem with which it had been concerned in considering the Webb-Kenyon Act. That problem, it will be recalled, was the inability of a "dry" state to stop delivery of liquors to consignees within the state.

That the language of Section 2 of the Amendment, in the light of all these circumstances, followed that of the Webb-Kenyon Act was not surprising. It would have been surprising if language essentially different had been chosen. But nowhere does the similarity become so compelling as in a statement on the floor by Senator Sanders, who had been associated in the drafting of the Webb-Kenyon Bill and was actively in charge of it in the Senate, that if the Bill were stripped of unnecessary verbiage it would read: "That the shipment of intoxicating liquor from one State into any

other State by any person, to be received or used in violation of any law of such state, is hereby prohibited." (49 Cong. Rec. 699) For convenience of comparison, that paraphrase of the Webb-Kenyon Act and the second section of the Twenty-first Amendment are printed here in parallel columns:

| Webb-Kenyon Act (Paraphrase) | Twenty-first Amendment (Section 2) |
|---|---|
| "That the shipment of intoxicating liquor from one State into any other State by any person, to be received or used in violation of any law of such State, is hereby prohibited." | "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." |

Reference has already been made (p. 30) to the pivotal words, "delivery" and "use," and that they had acquired a statutory meaning. The meaning is revealed by a consideration of the purposes for which the words were employed. "Delivery" is not found in the Webb-Kenyon Act, but the antecedent idea occurs in the words "to be received, possessed, sold * * *." The draftsman of the Amendment, pursuant to the general scheme of the Constitution not to particularize, undertook to phrase the Amendment in terms more general than the Webb-Kenyon Act. This is shown, for example, by the omission of four of the five adjectives in the descriptive part of the Webb-Kenyon Act ("spirituous, vinous, malted, fermented or other intoxicating liquor") and the employment of the last alone, namely "intoxicating," with its comprehensive meaning under the Eighteenth Amendment. Moreover, the enforcement of the Webb-Kenyon Act involved a subjective inquiry: whether the liquor was "intended by any person interested therein to be received, possessed, sold, or in any manner used * * * in violation" of state law. The difficulties of proof of such intent were frequently referred to in the debate on that Act. But those difficulties were obviated, and at the same time the

application of the Amendment made more objective, by the omission of the element of intent. The use of the word "delivery" not only carried the process of simplification one step further but it adequately covered, and thus enabled the states to deal with, the principal problem which had vexed them since the *Rhodes Case.*

"Use" is taken directly from the Webb-Kenyon Act. It is related to a problem of state power not so acute as that involved in "delivery," but yet one of potential importance, viewed in the light of the prohibition movement before and shortly after passage of the Webb-Kenyon Act. In the zeal to cope with the prohibition problem some of the states, as well as Congress, had passed statutes which interfered with the possession or transportation of intoxicating liquors even for personal use.[14] The ultimate legislative object of prohibition, declared Chief Justice Taft, "is to prevent the drinking of intoxicating liquor by any one because of the demoralizing effect of drunkenness upon society. The State has the power to subject those members of society who might indulge in the use of such liquor without injury to themselves to a deprivation of access to liquor in order to remove temptation from those whom it would demoralize and to avoid the abuses which follow in its train." *Samuels* v. *McCurdy,* 267 U. S. 188 (1925), sustaining a Georgia law of 1907 prohibiting possession. And see *United States* v. *Hill,* 248 U. S. 420 (1919), sustaining the Reed Amendment prohibiting interstate transportation for personal use.

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[14] This phase of the problem is amply illustrated by the frequent, but always unsuccessful efforts, in the course of the consideration of the Webb-Kenyon Act to amend it so as to exclude from its operation the transportation of intoxicating liquors for personal use. In opposition to these proposed amendments it was sometimes stated that while there was no general expectation that the several states would prohibit the personal use of intoxicating liquors, nevertheless if the states did desire to do so, their power to effectuate a policy to that effect would be implemented by the Webb-Kenyon Act.

The aim of the Webb-Kenyon Act was to put "dry" states in a position to deal with all phases of the liquor problem that could arise in a state committed to a policy of prohibition. That Act was concerned with social, not tariff and trade-rivalry, problems. And it was still a social problem which Congress was considering when late in 1932 it took up the question of submitting a new amendment to the states on the subject of intoxicating liquors.

2. *Submission by the Congress.*

The sole question which Congress, by Section 2 of the Twenty-first Amendment, intended to submit to the states for their determination, was whether those states which wished to remain "dry" after the repeal of the Eighteenth Amendment should be protected in their desire by a permanent constitutional provision. No issue—viewing the issue as it was viewed by the Congress—was presented as to how much protection, if any, ought to be accorded to "wet" states against the importation of rival liquor from other "wet" states.[15]

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[15] S. J. Res. 211, which ultimately became the Twenty-first Amendment, was introduced by Senator Blaine and referred to the Judiciary Committee Dec. 6, 1932. It was reported out with amendments Jan. 6, 1933, namely, to strike out all after the resolving clause and insert four sections: (1) to repeal the Eighteenth Amendment; (2) for the protection of the states—the form in which it was finally ratified; (3) to give Congress concurrent power over the saloon; (4) to provide for ratification by legislatures within seven years. Of these, Secs. 1 and 2 remained intact; Sec. 3 was stricken out, 76 Cong. Rec. 4179; Sec. 4 was amended by substituting "conventions" for "legislatures," 76 Cong. Rec. 4169. A motion by Senator Robinson to strike Sec. 2 was withdrawn on the basis of an argument by Senator Borah that that section was necessary in order to insure the permanency of the Webb-Kenyon doctrine. As so amended, the Resolution passed the Senate Feb. 16, 1933 (76 Cong. Rec. 4231), and the House Feb. 20, 1933 (76 Cong. Rec. 4516). Excerpts from the Congressional debate on Sec. 2 are included in Appendix A, (p. 2 et seq.). The arrangement is chronological.

Section 2 received careful consideration and full explanation during the Congressional debates. It was one of the focal points of the controversy over submission. But while the issue was sharply drawn as to whether Section 2 should be included in the proposal to be submitted to the states, no disagreement was expressed as to what the effect would be if the proposal were ratified.

The unanimity of legislative opinion as to the effect of Section 2 is nowhere better illustrated than in the consideration given to the motion by Senator Robinson that Section 2 be stricken out of S. J. Res. 211. Senator Borah spoke in opposition. He based his insistence upon the retention of Section 2 squarely upon the uncertainty of the protection afforded to "dry" states so long as the Webb-Kenyon Act remained merely a statute. This uncertainty, he argued, was due to two factors, one, the doubtful constitutionality of the Webb-Kenyon Act, with the consequent possibility that it might still be nullified by this Court; and two, the fact that the Webb-Kenyon Act did not represent a settled legislative policy and therefore might be repealed by the Congress:

> "Mr. President, it has been said that the Webb-Kenyon Act is a sufficient protection to the dry States. The Webb-Kenyon Act was sustained by the Supreme Court of the United States by a divided court. The President of the United States—President Taft, who was afterwards Chief Justice—vetoed it on the ground that it was unconstitutional. The Attorney General of the United States rendered an opinion to the effect that it was unconstitutional. Elihu Root, when in the Senate, argued that it was unconstitutional. Mr. Justice Sutherland, who is now upon the Supreme Bench, argued before the Senate that it was unconstitutional. Therefore, Mr. President, we are turning the dry States over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it. Secondly, we are asking the dry States to rely upon the Congress of the

United States to maintain indefinitely the Webb-Kenyon law.

> "It will be recalled that at the time the decision of the Supreme Court was made with reference to the Webb-Kenyon Act immediately thereafter there began a campaign upon the part of those interested in the liquor traffic to secure one of two things—either a repeal of the Webb-Kenyon Act by act of Congress or a reconsideration in the court. Thus, at the time of the adoption of the eighteenth amendment, that was an unsettled problem. It had not become, and never has become—except in the sense that now, since the adoption of the eighteenth amendment, it has not been contested as it otherwise would have been—it never has become a settled policy of the Government or a settled policy of the Congress and, it seems to me, could not be accepted as a sufficient protection to the dry States." (76 Cong. Rec. 4170; see also Appendix A, p. 11).

At the conclusion of Senator Borah's remarks, during which he had outlined the struggle of "dry" states to prevent importations of liquor into their territory, and reviewed the decisions of this Court upon legislative efforts in that direction, Senator Robinson voluntarily withdrew his motion. The colloquy which followed is significant. Senator Borah said:

> "All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States." (76 Cong. Rec. 4172; see also Appendix A, p. 12).

That this interpretation of Senator Robinson's action in withdrawing his motion was correct is apparent from his own remarks and those of Senator Wagner:

> "Mr. WAGNER. In view of the inquiry made, I may say to the Senator that I have made a study of the history of these decisions to which he has been referring, and it is on account of those decisions, so far

as I am concerned, that if the dry States want additional assurance that they will be protected I shall have no objection.

"Mr. ROBINSON of Arkansas. Mr. President, I had that thought myself. I do not wish to ask the Senate to put itself in the position of denying any measure of protection to dry territory." (76 Cong. Rec. 4171; see also Appendix A, p. 12).

Senator Borah was a member of the Judiciary Committee, to which S. J. Res. 211 had been referred, and in which it had been amended. As one, therefore, who shared responsibility for the exact language of Section 2, his remarks as to its intended effect have added weight. The further fact that he was among the supporters of the original Webb-Kenyon Act and familiar with its language as against the language of Section 2, makes his interpretation a persuasive one.

Why the exact language of the Webb-Kenyon Act was not copied into Section 2 of the Twenty-first Amendment is suggested by the numerous criticisms of Section 2 upon the ground that it represented a statutory type of regulation rather than one which should properly be embodied in the Constitution. Senator Walsh of Massachusetts had read into the record three statements opposing upon this very ground the resolution as it had been reported out of the Judiciary Committee. One of the statements was by the President of the Association Against the Prohibition Amendment, (Appendix A, p. 7), and one by the co-author of the repeal plank in the Democratic platform, (Appendix A, p. 8). The third statement is contained in an editorial which summarized the criticism succinctly as follows:

"The Committee, ignoring the existence of the Webb-Kenyon Act, which gives this 'protection,' added another clause, which was not a constitutional enactment but simply federal legislation prohibiting the transportation or importation of alcoholic liquors from wet to dry states. Thus * * * the Committee * * * imbedded in the Constitution, which should be a state-

ment of fundamental principles in government, an offensive form of sumptuary legislation." (76 Cong. Rec. 4176; see also Appendix A, p. 13).

It may be assumed that it was in deference to this strong sentiment against the inclusion in the Constitution of minute regulations of the type customarily found in mere statutes, that a form of Section 2 embodying only thirty-one words, as against the 154 words appearing in the Webb-Kenyon Act, was adopted.

The remarks of Senator Blaine, who was the author of S. J. Res. 211 in its original form, and who was in charge of the Judiciary Committee's Amendment during its passage through the Senate, provide equally strong evidence on what the intention of Congress was as to the effect of Section 2. His original Resolution had prohibited the introduction of liquor into any state "for use therein in violation of its laws," "if the laws in force therein prohibit such transportation or importation." The final Resolution itself prohibited the transportation or importation into any state "for delivery or use therein * * * in violation of the laws thereof." Senator Blaine, however, had no quarrel with the change of language made by the Committee. He treated the new language as the exact equivalent of the old:

> "Mr. President, in agreeing to that section, I think the committee was unanimous in agreeing that the language used would effectuate the purpose that is obviously designed by Section 2." (76 Cong. Rec. 4140, see also Appendix A, p. 8).

Senator Glass offered as a substitute for S. J. Res. 211 another Resolution also couched in terms of prohibiting the importation of liquor into states which *prohibited* its manufacture, sale or transportation. (See Appendix A, p. 15). But in spite of numerous opportunities to point out wherein the language of his Resolution differed in effect from the language of Section 2 of S. J. Res. 211, Senator Glass failed to do so. On the contrary, he compared his Resolution to

the other and intimated that the effect of the two different types of language would be identical.[16]

No changes were made in the form of the Resolution adopted by the Senate during its passage through the House. Remarks by members of the House were general and in conformity with the views expressed in the Senate as to the effect of Section 2. They were variously phrased: the purpose of the Twenty-first Amendment was to keep the "dry" states "dry"; the fundamental law and basic structure of the Government as it existed prior to the Eighteenth Amendment would be restored; the Twenty-first Amendment would injure the permanence of the Webb-Kenyon Act without changing its effect.

Despite the lengthy and careful debates over Section 2 as to whether it should be included in or excluded from the Twenty-first Amendment, the effect of that Section was thoroughly understood by the legislators on both sides of the question as simply making permanent the protection of "dry" states in the manner of the Webb-Kenyon Act. The problem of what one "wet" state could do with regard to rival liquor coming from other "wet" states was not even seen by the Congress, much less debated by it, and assuredly, therefore, not submitted by it to the states for their determination.

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[16] During the debate over Senator Glass' substitute Resolution, he said: "So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation and sale of liquors" (76 Cong. Rec. 4219; see also Appendix A, p. 15). This statement standing alone and unexplained without any disclosure of the source of the objection referred to, its character, or its target, is the only intimation, apart from some equally vague remarks by Representative Lea (See Appendix A, p. 15) that Congress or any of its members even perceived the possibility of the Twenty-first Amendment affecting shipments of liquor from one wet state into another.

3. *Public opinion and ratification.*

Public opinion, manifested officially in conventions for the ratification of the Twenty-first Amendment as well as unofficially, attributed to that Amendment no purpose to restore the nation to a pre-constitutional era of trade wars in intoxicating liquors. No leave was meant to be given "wet" states to discriminate between rival liquors coming from other "wet" states. The popular movement was concerned with the social problem of prohibition, and such expression of opinion as there was, apart from sentiment urging repeal of the Eighteenth Amendment, favored federal aid and insulation against intoxicating liquors only for states continuing for themselves a genuine policy of prohibition after the termination of national prohibition.

The platforms of both major political parties in 1932, in response to popular demand, contained planks favoring the repeal of national prohibition, but neither party advocated, after its repeal, a greater abatement of the Commerce Clause than had been effected by the Webb-Kenyon Act. The Democratic plank, after urging repeal, demanded "that the Federal Government effectively exercise its power to enable the States to protect themselves against importation of intoxicating liquors in violation of their laws." The Republican plank added the desire that the Federal Government "safeguard our citizens everywhere from the return of the saloon and attendant abuses." (Appendix B, p. 20.)

At the first Congressional session thereafter, the Resolution which was to become the Twenty-first Amendment was adopted. The New York Times commented editorially: "The second section maintains, constitutionally, the protection of States which wish to remain Dry from importation of intoxicating liquors from other States." The Christian Science Monitor observed that "Section 2 . . . would put into the Constitution the essence of what is now statu-

tory law under the Webb-Kenyon Act." That is the pith of a sampling of editorial comment about Section 2: it put the Webb-Kenyon Act into the Constitution. Seen as so doing, it was viewed, variously, as an "unnecessary clause" or as a constitutional guarantee against repeal by Congress of the Webb-Kenyon Act. For other editorial comments, see Appendix B, p. 21 et seq.

Opinions by the leaders, both for and against the repeal of the Prohibition Amendment, were in agreement that Section 2 merely put the substance of the Webb-Kenyon Act into the Constitution. Thus, on the one side it was observed that "The section which writes the Webb-Kenyon Act into the Constitution is unnecessary." And on the other side, that the repeal amendment "will return conditions as they were before the Eighteenth Amendment was adopted." Lay opinion, it is clear, considered Section 2 as doing no more than to bring the country back to pre-Prohibition days. Not even a suggestion has been found (in as full a sampling of contemporary newspaper comment as is available in New York City) to indicate the existence of any opinion anywhere that the states would be restored to the position they occupied before the adoption of the Constitution. See further, Appendix B, p. 21 et seq.

Comments in legal periodicals unanimously express the opinion that Section 2 did no more than put the Webb-Kenyon Act into the Constitution. As expressed by one writer, it "merely confirms the state of the law at the time national prohibition went into effect." For further legal comments, see Appendix B, p. 23 et seq.

Official expression of public sentiment on the Twenty-first Amendment is found in the proceedings for its ratification. An examination of the legislation which provided for the calling of ratifying conventions, of the ballots by which the delegates thereto were chosen, and of the jour-

nals of the conventions themselves[17] discloses no purpose whatever to relieve the states altogether from the limitations of the Commerce Clause after repeal of the Eighteenth Amendment.

The question put to the people for their determination through the ratification conventions was essentially whether the Eighteenth Amendment should or should not be repealed. In twenty-two states, or more than half of those which ratified the Amendment[18], the statutes were special in character (*i.e.*, were concerned only with conventions to pass on the question of repealing the Eighteenth Amendment) and most of the ballots for the election of delegates presented to the voters only the alternatives (usually printed in boldface type): "FOR REPEAL" or "AGAINST REPEAL." No question was presented of repealing anything more than national prohibition or of going further back in time than the period immediately preceding the adoption of the Eighteenth Amendment. Certainly, a restoration of the liquor problem to the pre-constitutional era of trade wars between the Colonies was not even posed as a possible alternative.

Repeal was the only expressed purpose of most of the conventions, and in some it was specifically declared to be

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[17] Most of the Journals of the conventions' proceedings have been collected in the library of the School of Law of Columbia University. More recently the Journals have been made available in a single volume compiled by Professor Everett S. Brown, of the University of Michigan, and published by the University of Michigan in 1938, under the title, "Ratification of the Twenty-first Amendment to the Constitution of the United States." In the few instances where Journals either were not kept or were not obtainable, Professor Brown has inserted press reports of the convention proceedings. Page references herein to that volume will be indicated thus: (Brown, p. )

[18] The Twenty-first Amendment was ratified by 38 states; South Carolina was the only State which voted upon it in convention and rejected it.

the sole purpose. In the process of organizing the conventions, something of a common purpose is disclosed, namely, to give the principal positions to delegates who had been conspicuous in the fight for the repeal of the Eighteenth Amendment. The titles of the Journals, the language of debate, the mode of summing up the results, the forms for certifying the action taken—all were largely in terms of repeal. The conventions were in truth, as the Journal of at least one described it, "repeal conventions." (Brown, p. 95.)

Section 2, on the total record of all the conventions, is specifically referred to but once. This single reference appears in the Journal of the Idaho Convention as follows: "Repeal of the Eighteenth Amendment is now assured. This means that those who traffic in liquor across state lines which have dry laws may and will be prosecuted in the Federal courts as provision is made in the Twenty-first Amendment that 'the transportation and importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited.' " The reference is of interest, and not without significance, because of the speaker's assumption, if not his explicit statement, that federal protection was to be accorded not to the states generally, but to states *"which have dry laws."*

Though the record is nearly barren on the subject of Section 2, it is fairly full on the intended consequence of the repeal of the Eighteenth Amendment. The purpose was to undo what had been done in 1919, to withdraw the grant of "police power" to Congress to legislate concerning intoxicating liquors, to destroy the policy of national prohibition, and to restore the states to their position before what was called the "tragic mistake" of adopting the prohibition amendment—all this being summed up in a single word, "repeal." Governor Lehman, calling the New York Convention to order pursuant to the statute, spoke of "the fight to regain that balance between state and na-

tion which is guaranteed by the Constitution of the United States," (Brown, p. 297), and James W. Wadsworth, on being presented to the Convention after his election as first Vice-president, expressed the opinion that when repeal shall have been consummated "we shall have restored to the people of the States that power to govern their own affairs which was unwisely in a moment of hysteria taken away from them back in 1918." (Brown, p. 306)

Summarizing, then, the official records of the ratification of the Twenty-first Amendment, the purposes of the people in adopting that amendment appear to have been:

1. To repeal the Eighteenth Amendment. On this the conventions were vocal and explicit.

2. To return the liquor problem to the states to be handled by them under a legal situation such as existed prior to the adoption of the Eighteenth Amendment, but not such as existed prior to the adoption of the Constitution itself. This was to some extent explicit, though for the most part it was implicit, in the argument for repeal. Apart from such statements as those of Governor Lehman, quoted above, the unbroken silence on the part of advocates, if there were any, of a return to the pre-constitutional era, is significant. For if anywhere at any time or by anybody, the notion had been entertained that the Twenty-first Amendment would completely undo the commerce clause and restore the states to the position they occupied prior to the adoption of the Constitution, surely a notion of such consequence would at least have been mentioned on some occasion. But we have found none.

While the record of ratification furnishes relatively little aid in determining the exact effect to be given to Section 2 as modifying the Commerce Clause, it at least indicates no divergence in the views of the people expressed during the period of ratification from the views expressed

by their chosen representatives in Congress during the period of submission. The views expressed then, reinforced by a consideration of the antecedent evils toward which they were directed, and reinforced further by unofficial expressions of public opinion, political and otherwise, during the period intervening between the submission of the Amendment and its ratification, furnish clear and convincing proof that Section 2 of the Twenty-first Amendment was never intended to do more than permanently embody in the Constitution the substance of the Webb-Kenyon doctrine. From the beginning of the agitation for the Twenty-first Amendment until its final ratification, the problem with which the people and their representatives were grappling was conceived to be the social problem of prohibition. The Twenty-first Amendment was designed to end national prohibition and return the liquor problem to the states. To those states which wished to continue for themselves a genuine policy of prohibition, protection against the importation of intoxicating liquors into their borders was given. Further than this, the amendment did not go. See *Commonwealth* v. *Stofchek,* 185 Atl. 840, 845, 846 (Pa. 1936). There was no purpose to aid wet states in discriminating against rival liquor from other wet states. The trade wars of Colonial days were neither desired nor contemplated.

Summarizing the results concerning the Twenty-first Amendment: the language of Section 2 is not open to the interpretation that the Commerce Clause limitations have been entirely removed as limitations upon state power over traffic in intoxicating liquors and that the states have been restored to the position which they occupied prior to the adoption of the Constitution as to this commodity. Even though the language were thought to justify this result, the very purpose of the Amendment would foreclose any such view and require its rejection. The view of the Twenty-first Amendment for which we contend would wipe out the objectionable and dangerous character of the results which would

inevitably flow from a condition divesting the states of any limitation with respect to legislation pertaining to intoxicating liquors under the commerce clause. The contention we urge would preserve the basic character of the American constitutional system without impeding the powers of states to deal with the problem that the Twenty-first Amendment sought to deal with, namely, the *local policy of prohibition* in each state.

For about a century now the people, the legislatures and the courts of this country have wrestled with this prohibition problem. The states and Congress have legislated on the subject. Twice have the people amended the Constitution with respect to the problem. This Court itself has not been free of divided opinions on the subject. Witness the decisions and opinions pertaining to this subject beginning with the *License Cases* in 1847.

Perhaps no issue except slavery has engendered so much difficulty, bitterness and conflicting judgment. At one time or another in the past one hundred years the country has been in a veritable ferment with respect to the question of prohibition. An incalculable expenditure of time, thought, energy and money has been pressed into the service of its attempted solution, with the Twenty-first Amendment marking the latest chapter in the long course of trial and error in reaching the attempted solution. Surely no one will say that at the end and consummation of this long, drawn-out struggle the constitutional clock has been turned back one hundred fifty years and that with respect to intoxicating liquor there is a throw-back to the commercial chaos which existed prior to the adoption of the Federal Constitution and from which the Commerce Clause in particular was designed to rescue it. The history of the Amendment demonstrates that the people of the United States have not willed it so.

## CONCLUSION

We respectfully submit that the judgments of the court below were erroneous, that the complaints stated a cause of action in equity for the relief requested, that the plaintiffs should have had judgment restraining the defendants from giving effect to the Missouri Retaliation Statute and that preliminary injunctions should have been granted in accordance with the prayer of the bill of complaint.

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CLERK

# Supreme Court of the United States,

OCTOBER TERM, 1938

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No. 252

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, and SCHENLEY DISTRIBUTORS, INC.,

Appellants,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

---

No. 253

BEN BURK, INC.

Appellant,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

---

No. 254

JOSEPH E. SEAGRAM & SONS, INCORPORATED, and SEAGRAM-DISTILLERS CORPORATION,

Appellants,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

---

No. 255

HINRICHS DISTILLED PRODUCTS,

Appellant,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

---

No. 256

ARROW DISTILLERIES, INC.

Appellant,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

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## APPENDIX TO APPELLANTS' BRIEF

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## APPENDIX A

### CONGRESSIONAL DEBATE
### on the
### Submission of the Twenty-first Amendment

The Twenty-first Amendment became a part of the Constitution of the United States through the ratification of Senate Joint Resolution No. 211 of the 72nd Congress, Second Session.

The original form of this Resolution, introduced by Senator Blaine and referred to the Senate's Committee on the Judiciary on December 6, 1932, was as follows:

**"ARTICLE—**

"*Section 1.* The Eighteenth article of Amendment of the Constitution of the United States is hereby amended to read as follows:

**"'ARTICLE XVIII**

"'*Section 1.* The provisions of clause 3 of Section 8 of Article I of the Constitution, vesting in the Congress the power to regulate commerce with foreign nations and among the several States and with the Indian tribes, shall not be construed to confer upon the Congress the power to authorize the transportation or importation into any State or Territory of the United States for use therein of intoxicating liquors for beverage or other purposes within the State or Territory if the laws in force therein prohibit such transportation or importation; and any such transportation or importation of intoxicating liquors into any State or Territory for use therein in violation of its laws is hereby prohibited. If any such transportation or importation of intoxicating liquors in violation of law is made, the liquors so transported or imported shall become subject to the laws of the State or Territory on arrival therein.

"'*Section 2.* The Congress shall have the power to enact laws in aid of the enforcement of, and not incon-

sistent with, the laws enacted by any State or Territory of the United States which has prohibited the transportation or importation of intoxicating liquors for beverage or other purposes into such State or Territory for use therein.' " (p. 65)*

1. *Prior Action in the House*

On the day before the introduction of Senator Blaine's Resolution, Representative Rainey had introduced in the House H. J. Res. 480, providing for straight repeal of the Eighteenth Amendment. This Resolution was not referred to a committee but was debated by the House under suspension of rules. In the course of the debate and in the extension of remarks, frequent objections were made upon the ground that it failed to contain any provision for the protection of States which wished to remain dry:

> MR. SNELL: I stated publicly many times during the campaign that I was in favor of returning the control of the liquor traffic to the States under certain restrictions: To guard against the saloon and protection for dry States. I have not changed my position. * * *
>
> This resolution is not as I would like it. It will be amended many times before it becomes a law; yet it does start legislation for the return of the control of liquor traffic to the individual States, which I favor, and personally I have decided to vote for it. (p. 8)

> MR. CHRISTOPHERSON: When the people come to think about this and to realize that we are submitting a resolution which will mean the return of the open saloon to a large area of our country and in no manner protects the dry States from importations from wet States, this amendment will fail of ratification. (p. 12)

> MR. BLANTON: If we repeal the Eighteenth Amendment, there are no safeguards that could be retained by the Government that would insure dry States from being overwhelmed with liquor brought across their borders. (p. 17)

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*All references are to the pages of 76 Congressional Record (72nd Congress, Second Session).

MR. EATON: The 1932 Republican platform expressly stated that the Republicans "did not favor a submission limited to the issue of retention or repeal," and that the people should have an opportunity to vote for the protection of States where prohibition may exist and safeguard against the return of the saloon. (p. 18)

MR. THATCHER: In the resolution there is no provision granting to the Federal Government the power to deal with the question of protection to the dry States. The existing interstate commerce clause of the Constitution is believed by many to be insufficient to afford to dry States the protective benefits which should be theirs in case there should be a repeal of the amendment.

The naked and unconditional repeal of the amendment will permit and invite the return of the saloon in the States which desire to be wet; and with the return of the saloon in those States the systematic invasion of the dry States by the saloon influences will immediately follow. (p. 18)

MR. RANKIN: In the first place, it does not give any assurance against the return of the saloon, as provided in both political platforms, nor does it make any provision for the protection of the dry States against the encroachments of the liquor traffic. (p. 19)

MR. PATMAN: It is contended that the Webb-Kenyon Act would protect the dry States. The Webb-Kenyon Act merely makes it a violation of the law for intoxicating liquors to be transported from a wet State into a dry State. The law would probably be obeyed by the railroads, express companies, and other common carriers but would be ignored by individuals desiring to violate the law. I remember when Texas was dry and there was a saloon in Monroe, La. Under the Webb-Kenyon Act the transportation companies would not transport intoxicating liquors into Texas from Louisiana; but individuals from Texas, in great numbers, when the roads were bad and the means of transportation not so convenient as to-day, would go there, obtain intoxicating liquors, and return to Texas with it. (p. 22)

MR. COOPER: While I pledged myself for resubmission of the Eighteenth Amendment, as provided for in the Republican Party platform, I can not support the resolution being considered by Congress to-day, as it does not contain the provisions in the plank of the Republican Party platform prohibiting the return of the saloon and protection to States that desire to remain dry. (p. 22)

MR. GLOVER: Mr. Speaker, I had hoped that when a resolution was introduced in this Congress it would be in proper form so as to protect the dry States * * *

The wording of the resolution now submitted is as follows: "The eighteenth article of amendment is hereby repealed." Not a word or a syllable in it to protect any State that did not want liquor sold in it. (p. 23)

MR. LEAVITT: I stated then that I would not oppose the submission of a proposed amendment to the Constitution to change the Eighteenth Amendment if it contained a guaranty against the return of the saloon and a provision to give protection to such States as should, by their own vote, desire to retain prohibition. (p. 24)

MR. WILLIAMSON: Can anyone doubt that a majority of this body would much prefer to submit the proposed repeal of the Eighteenth Amendment with some safeguards for those States that may choose to remain dry?

It may well be that constitutional prohibition is not the best solution, but I am confident that the people of my State do not expect or want me to vote for a proposition which will give them no protection whatever in case they should elect to retain their present State prohibition law. (p. 25)

Some of the Representatives who discussed the question of protection for dry States, although expressing their approval of granting such protection, were in favor of the Resolution in spite of its failure to carry any explicit provision in this respect. Mr. LaGuardia said:

"* * * Congress has the power to protect dry States. That power has been repeatedly asserted by Congress and upheld by the Supreme Court." (p. 10)

Mr. White stated that writing into the Constitution the provisions of the Webb-Kenyon Act would be improper and unnecessary, since they represented a type of specific regulation which should not be embodied in the fundamental law:

> "There are to-day Federal laws regulating interstate commerce of sufficient force to protect those States which would choose to retain prohibition under State legislation or State constitutional provision. These laws certainly demonstrate the sufficiency of the authority of Congress to make such laws. It is unnecessary to provide a power already possessed." (p. 32)

H. J. Res. 480 was defeated by a narrow margin (272 Yeas to 144 Nays) on December 5, 1932. (p. 13)

2. *Debate in the Senate*

Introducing S. J. Res. 211, Senator Blaine said:

> "The effect of the joint resolution is to effectuate a complete repeal of the Eighteenth Amendment and to take out of the Federal Constitution the power of Congress relating to prohibition, except in so far as the Congress may assist the several States which desire prohibition in the protection of those States." (p. 64)

Senator Blaine's Resolution was reported out of the Judiciary Committee on January 6, 1933, with Section 2 in the form in which it finally passed.

Before the debate on S. J. Res. 211 was resumed, two statements were read into the record which opposed the form of the Resolution as it had been amended by the Committee on the Judiciary. In both, opposition to Section 2 was mild, and based upon the belief that the Webb-Kenyon Act afforded dry States sufficient protection without any explicit provision in the Constitution embodying its substance. Both statements, moreover, indicated the belief that the terms of Section 2 were merely an attempt to restate the Webb-Kenyon Law as part of the Constitution and,

therefore, their authors found no serious objection to leaving Section 2 in since it seemed to provide a greater sense of security to dry States. Pertinent provisions of the statement by Jouett Shouse, President of the Association Against the Prohibition Amendment, follow:

"Those who believe in an orderly process of prohibition reform have no objection, in so far as I know, to affording every proper measure of security to States which do not want liquor sold within their borders. If to accomplish this purpose it were necessary that further constitutional power be given, there would be every justification for this portion of the resolution. As a matter of fact, however, the Supreme Court has upheld the right of Congress, as exemplified by the Webb-Kenyon law, to prevent the importation of liquor into any State where the State laws of such State prohibit such importation. As recently as last May in a unanimous opinion the Supreme Court declared that the Webb-Kenyon law has not been affected in even the most remote way by the adoption of the Eighteenth Amendment or the enactment of legislation interpretative thereof, and that if the Eighteenth Amendment should be repealed, the Webb-Kenyon Law would still stand in full force and effect.

"Even so authoritative an advocate of prohibition as Senator Borah, of Idaho, in the course of debate in the Senate on July 16 last, gave utterance to the following significant statement:

"'Congress has that power [to prevent shipment of alcoholic beverages into so-called dry States], or will have it just as soon as the Eighteenth Amendment shall be repealed. The provision adds nothing whatever to it. * * * Nothing in the decision relative to the Webb-Kenyon Act would in any way detract from that power as expressed in the interstate commerce clause.'

"It would thus appear that any further steps looking to the protection of dry States are wholly unnecessary and represent merely a repetition of what is already embodied in the organic law of the land. But if such dry States will have a greater sense of security by a repetition of provisions such as that under dis-

cussion; certainly there is no particular objection thereto." (p. 1622)

Similarly, pertinent provisions from the statement of Mr. R. H. Anderson, coauthor of the repeal plank in the Democratic platform, follow:

> "I have no particular objection to Section 2, which prohibits the transportation of liquor into dry States in violation of the laws thereof, although it is unnecessary, because Congress indisputably has that power anyhow. However, if the dry States wish it written into the Constitution any more plainly than it is already, I shall not protest." (p. 4001)

Senate debate on S. J. Res. 211 commenced on February 15, 1933, with Senator Blaine speaking for the Committee on the Judiciary. His remarks make it entirely clear that the Committee's only purpose, in including Section 2, was to insure the permanence of the Webb-Kenyon Act. In his statement, he repeatedly uses the words "dry States"; he does not refer to the problem of one wet State excluding the products of another wet State:

> "Then we have suggested and offered Section 2, which provides as follows:
>
> 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited.'
>
> "Mr. President, in agreeing to that section I think the committee was unanimous that the language used would effectuate the purpose that is obviously designed by Section 2. It is claimed, however, and I think with some degree of assurance for the future, that Congress now has the power to pass laws to protect the so-called dry States in regulation of interstate commerce over intoxicating liquors. A great many laws on that subject have been enacted.
>
> "I will not review those laws in detail. First, however, we had what is known as the Wilson Law. That law was treated in the case of Rhodes v. Iowa (170 U. S. 412); but the Supreme Court in that case gave rather a restricted construction of the language used by the

Congress, and held that under the Wilson Act the interstate character attached to the liquor until it had actually been delivered to the consignee. In other words, the court held that the interstate-commerce clause—that is, the power of Congress to regulate interstate commerce—attached to that commodity not only before it entered the State but after it entered the State so long as it was in process of transportation either by rail, by express, or by any other method, until the commodity or the intoxicating liquor was in fact delivered to the consignee.

"Then came an amendment to the Wilson Act, known as the Webb-Kenyon Act. The Webb-Kenyon Act was interpreted by the Supreme Court of the United States in the case of Clark Distilling Co. v. Western Maryland Railway Co. (242 U. S. 311). The language of the Webb-Kenyon Act was designed to give the State in effect power of regulation over intoxicating liquor from the time it actually entered the confines of the State; and the Supreme Court held that it was following the doctrine laid down in the case of Rhodes against Iowa, and necessarily must follow that doctrine in order to sustain the decision it was making in the case of Clark against Maryland Railway Co. * * *

"Then, following the Webb-Kenyon Act, was the Reed 'bone dry' amendment. That went somewhat further. I need not discuss that. That amendment was sustained by the Supreme Court in the case of United States v. Hill (248 U. S. 420).

"In the case of Clark against Maryland Railway Co. there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

"Mr. President, the pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity—namely, in-

toxicating liquor. In other words, the State is not surrendering any power that it possesses, but rather, by reason of this provision, in effect acquires powers that it has not at this time.

"The committee felt that since the Congress had acted and had definitely legislated upon this question, while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court, and that we could well afford to guarantee to the so-called dry States the protection designed by Section 2.

"I am opposed to the dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors." (pp. 4140-4141)

Then came a motion by Senator Robinson to strike Section 2. Senator Borah was the chief speaker on this motion. He opposed it on the ground that the dry States ought to have permanent protection. He admitted that, under the present decisions, the Webb-Kenyon Act was constitutional, but feared that it might later be held unconstitutional or that it might be repealed. He discussed at some length the various Supreme Court decisions dealing with liquor in interstate commerce, pointing out that a division of opinion had long existed on the question, and that the Webb-Kenyon Act itself was sustained by a divided Court. His conclusion was that constitutional doubt still existed as to the Act and that efforts to repeal it were likely to be numerous:

"I look upon this provision of the amendment as vital. It does not seem to me that we can afford to strip the amendment of all effort to protect the dry States. Indeed, if I understand the two platforms, that is a part of the pledge of the platforms. While perhaps that is not controlling, it has been emphasized to-day to a considerable extent, and perhaps some would feel that they should be bound by it. I do not cite it, how-

ever, as binding myself.

"Mr. President, it has been said that the Webb-Kenyon Act is a sufficient protection to the dry States. The Webb-Kenyon Act was sustained by the Supreme Court of the United States by a divided court. The President of the United States—President Taft, who was afterwards Chief Justice—vetoed it on the ground that it was unconstitutional. The Attorney General of the United States rendered an opinion to the effect that it was unconstitutional. Elihu Root, when in the Senate, argued that it was unconstitutional. Mr. Justice Sutherland, who is now upon the Supreme Bench, argued before the Senate that it was unconstitutional. Therefore, Mr. President, we are turning the dry States over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it. Secondly, we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon Law.

"It will be recalled that at the time the decision of the Supreme Court was made with reference to the Webb-Kenyon Act immediately thereafter there began a campaign upon the part of those interested in the liquor traffic to secure one of two things—either a repeal of the Webb-Kenyon Act by act of Congress or a reconsideration in the court. Thus, at the time of the adoption of the Eighteenth Amendment, that was an unsettled problem. It had not become, and never has become—except in the sense that now, since the adoption of the Eighteenth Amendment, it has not been contested as it otherwise would have been—it never has become a settled policy of the Government or a settled policy of the Congress and, it seems to me, could not be accepted as a sufficient protection to the dry States.

"Mr. President, I want to go back a little in the discussion of this matter to the history of the fight of the dry States to remain dry and be protected. * * *

"While it is not directly on the point, I will ask Senators to bear in mind that for that length of time the Supreme Court of the United States sustained the Taney decision, which makes me rather uneasy about leaving the Webb-Kenyon Act to the protection of the

Supreme Court of the United States, because in 1888 they wiped out the Taney decision and established a new doctrine. * * *

"Therefore, if we are to have what we are now promised, local self-government, State rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have some other method, some other provisions of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment.

"All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States." (p. 4170-4172)

During the course of Senator Borah's discussion, parts of which are quoted above, Senator Robinson withdrew his motion to strike Section 2. In doing so, both he (Senator Robinson) and Senator Wagner expressed their concurrence in the views of Senator Borah:

MR. WAGNER: In view of the inquiry made, I may say to the Senator that I have made a study of the history of these decisions to which he has been referring, and it is on account of those decisions, so far as I am concerned, that if the dry States want additional assurance that they will be protected I shall have no objection.

MR. ROBINSON of Arkansas: Mr. President, I had that thought myself. I do not wish to ask the Senate to put itself in the position of denying any measure of protection to dry territory. (p. 4171)

Mr. Walsh of Massachusetts similarly recognized that the effect of Section 2 was merely to embody the Webb-Kenyon Act in permanent form, and opposed the Resolution mainly for that reason. His views are expressed in an editorial which he caused to be inserted in the Record:

"The drys protested that this would leave the dry States without protection against the States which

should legalize alcoholic beverages. Thereupon the committee, ignoring the existence of the Webb-Kenyon Act which gives this 'protection' added another clause, which was not a constitutional enactment but simple Federal legislation, prohibiting the transportation or importation of alcoholic liquors from wet to dry States. Thus at the outset of its work the committee authorized a Federal control, which is the very source of the evils of which the country is complaining, and imbedded in the Constitution, which should be a statement of fundamental principles in government, an offensive form of sumptuary legislation." (p. 4176)

This is, in substance, the view expressed in the statements of Mr. R. H. Anderson and Jouett Shouse, quoted above, which had also been inserted in the record at the request of Senator Walsh.

After Senator Robinson's motion to strike Section 2 had been withdrawn, Senator Glass brought up S. J. Res. 202 as a substitute for S. J. Res. 211. The text of Section 1 of S. J. Res. 202 follows:

**"ARTICLE—**

"*Section 1.* Article XVIII of the amendments to this Constitution is hereby repealed. The sale of intoxicating liquors within the United States or any territory subject to the jurisdiction thereof for consumption at the place of sale (commonly known as a saloon), and the transportation of intoxicating liquors into any State, Territory, District, or possession of the United States in which the manufacture, sale, and transportation of intoxicating liquors are prohibited by law, are hereby prohibited. The Congress and the several States, Territories, and possessions shall have concurrent power to enforce this article by appropriate legislation." (p. 4229)

The first objection made to this Resolution was on the ground that the portion prohibiting the movement of liquor into the dry States was unnecessary because such prohibition was presently within the power of Congress without

constitutional amendment (p. 4219).

Thereupon, Senator Walsh of Montana undertook to explain the purpose of Section 2 of S. J. Res. 211:

"I wish to say a word, in view of what has just been stated by the Senator from Florida in relation to the second paragraph of the joint resolution as tendered by the committee.

"It is true that the original Constitution authorizes Congress to prohibit the transfer of intoxicating liquors in interstate commerce. It is held, however, that that authority simply indicates the intention to have commerce free except as Congress may otherwise direct. It has been held that under the existing Constitution the right obtains on the part of any citizen to pass his goods into another State, and they remain under the protection of the Federal Constitution until they actually reach the hands of the consignee; so that they can not be stopped at the State line nor there fall under the jurisdiction of the State authorities, but the goods will not fall under the jurisdiction of the State authorities until they actually get into the possession of the consignee who may live in the center of the State. Meanwhile all manner of opportunity is afforded for the diversion of the intoxicating liquors from the consignee to whom they are addressed. Likewise, even then, the intoxicating liquor is protected by the commerce clause; if it remains on the siding in the car of the transportation company, it still remains under that protection, and if it goes into a warehouse belonging to the transportation company it remains under the protection of the Federal statute, and is immune from any control by State statutes until it actually reaches the possession of the consignee. The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter. It was so decided in a case reported in One Hundred and Seventieth United States Reports, with which, I think, the profession generally is not particularly familiar." (p. 4219)

Senator Glass argued that his Resolution had the same effect; but in so doing said:

> "Mr. President, in my own interpretation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry State. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution as I have drafted it prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale, or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors; but there can be no consignee in dry territory under the terms of my proposed amendment to the Constitution." (p. 4219)

Thereafter the Senator did not press the matter, but immediately dropped the subject and turned to the discussion of the return of the saloon.

The only other hint of Congressional recognition of any possible effect of the proposed amendment upon the traffic in intoxicating liquors from one wet State into another wet State is to be found in the comments of Representative Lea made during an extension of remarks on an appropriation bill shortly after the Senate Judiciary Committee had reported out S. J. Res. 211, as amended, and before the Resolution was officially before the House.

> "In view of the fact that Congress has authority, regardless of the Eighteenth Amendment, to prevent the interstate shipment of intoxicating liquor in violation of State laws, the provision of the Senate amendment 'prohibiting' such shipment is perhaps not of great consequence. * * *
>
> "The proposal to prohibit importations to the States in violation of their laws is illogical, even though unimportant in its practical effects. * * * Under this color of constitutional sanction a State might pass a law to interfere with legitimate interstate shipments. No one could measure the responsibility the Federal

Government would thus assume. No one could anticipate the many varied, and perhaps unwise, provisions that might be written by the various States of the country.

"That proposal, on principle, is the extreme of State rights." (p. 2776)

In the course of the discussion which followed Senator Glass' remarks, Senator Reed expressed a preference for the phraseology of Section 2 of S. J. Res. 211 as distinguished from the words in Senator Glass' Resolution (p. 4220). He wished, therefore, merely to combine the prohibition against the return of the saloon with Section 2 of S. J. Res. 211. Senator Glass, opposing the change suggested, did not point to any distinction between the language of his Resolution regarding interstate transportation of liquor and the language of Section 2 of S. J. Res. 211 (p. 4220).

The following colloquy between Senator Swanson and Senator Robinson of Arkansas is further illuminating on the effect of Section 2:

MR. SWANSON: Of course, my vote on the various amendments and substitutes will be dependent upon the issues involved. I have a great regard, as have the people of Virginia, for the judgment of my colleague, the junior Senator from Virginia [Mr. Glass], but as I understand Section 2 as adopted last night, it prohibits the transportation and use of any intoxicating liquors in a State, Territory, or possession of the United States that prohibits such transportation and use by its own laws. Is that true?

MR. ROBINSON of Arkansas: That is entirely true.

MR. SWANSON: As I understand, if the sale of liquor and saloons were to be prohibited by the State of Virginia or the State of Pennsylvania or any other State in the Union, Section 2, as adopted, would allow the Federal Government to prevent the transportation and use of intoxicating liquors within that State. Is that true?

MR. ROBINSON of Arkansas: That is true.

MR. SWANSON: Consequently, it is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported. Is that established definitely under Section 2 of the proposed amendment?

MR. ROBINSON of Arkansas: I think that is true. (p. 4225)

Finally, Senator Tydings read into the record an editorial apparently expressing his views to the effect that the only effect of Section 2 was a rewriting of the Webb-Kenyon Act, permanent in form:

"* * * The only proviso is a restatement of the Webb-Kenyon law, already on the law books, which would write into the Constitution the right of the dry States to have Federal protection against importation of liquor." (p. 4228)

Senator Glass' motion to substitute his Resolution for S. J. Res. 211 was defeated (p. 4230) and the latter Resolution was passed by the Senate, February 16, 1933. (p. 4231)

3. *Debate in the House*

On February 20, 1933, the Resolution, as passed by the Senate, was submitted to the House. The discussion there, whether in the course of the debate or in the extension of remarks, indicates that the Representatives looked upon Section 2 merely as a protection for dry States:

MR. EATON of Colorado: Mr. Speaker, in the last election, in both political parties, there was absolutely no dispute or debate on two propositions. One was the prevention of the return of the saloon and the other was the protection of dry States against wet States. (p. 4512)

MR. MCLEOD: Mr. Speaker, to-day the House of Representatives, for the second time this session of Congress, is afforded the opportunity to vote on re-

pealing the Eighteenth Amendment. On the first day of the present session we repealists in the House lacked only six votes of the two-thirds necessary, while to-day, with the additional impetus afforded by the Senate's favorable action last week, together with the added section of protection for dry States, every conceivable objection, in my opinion, is now squarely met." (p. 4517)

MR. GARBER: Section 2 prohibits the transportation or importation of intoxicating liquors for delivery or use into any of the several States where the laws of the States prohibit such. This section, it is claimed, will protect the dry States. If the resolution is adopted and intoxicating liquors are again legalized, Section 2 will prove unavailing in protecting the dry States. Bootlegging from the wet States into the dry States will be increased tenfold. (p. 4519)

MR. GIBSON: It provides protection for dry territory.

I feel that one of the strongest elements in this measure is the feature which gives to each State the right to regulate its own liquor traffic free from wet States' interference or so-called regulation by the present Government's discredited prohibition service. It will aid and protect the so-called dry States in permitting them to exclude, if their citizens so wish, all liquor traffic in their domains. (p. 4526)

MR. MCSWAIN: The proposal voted on today gives to every State absolute power to control the manufacture, sale and transportation of alcoholic and intoxicating beverages. It will be up to the people of every State to say whether or not they will permit any intoxicating beverages to be sold or transported or stored in each such State, and if they, by their State laws, prohibit such manufacture, sale, and transportation within the State, then, such State laws will be supreme on that question, and whiskies can not be shipped into, or transported into such State; and, if laws prohibiting such importation and transportation of intoxicating beverages are violated by common carriers, or by private individuals, then State courts, and

State juries must try, and convict, and punish all such violations. (p. 4523)

The Resolution was passed, without amendment, in the House on February 20, 1933. (p. 4516)

## APPENDIX B

## PUBLIC OPINION

on

Section 2 of the Twenty-first Amendment

1. *Political Platforms, 1932.*

*Democratic Platform, 1932.* "We advocate the repeal of the Eighteenth Amendment.

"To effect such repeal we demand that the Congress immediately propose a constitutional amendment to truly representative conventions in States called to act solely on that proposal; we urge the enactment of such measures by the several States as will actually promote temperance, effectively prevent the return of the saloon and bring the liquor traffic into the open under complete supervision and control by the State.

"We demand that the Federal Government effectively exercise its power to enable the States to protect themselves against importation of intoxicating liquor in violation of their laws."

*Republican Platform, 1932.* "We, therefore, believe that the people should have an opportunity to pass upon a proposed amendment the provisions of which, while retaining in the Federal Government power to preserve the gains already made in dealing with the evils inherent in the liquor traffic, shall allow States to deal with the problem as their citizens may determine, but subject always to the power of the Federal Government to protect those States where prohibition may exist and safeguard our citizens everywhere from the return of the saloon and attendant abuses."

2. *Editorial Comments.*

*New York Times, February 17, 1933, Editorial.* "The second section maintains, constitutionally, the protection of States which wish to remain Dry from importation of

intoxicating liquors from other States." (Page 18, Column 2)

*Christian Science Monitor, Boston, February 17, 1933.* "As passed by the Senate yesterday, the resolution now before the House has only one qualification to the so-called 'naked repeal' proposal * * * This is Section 2, which would put into the Constitution the essence of what is now statutory law under the Webb-Kenyon Act, directing our Federal Government to prohibit importation of liquor into dry States." (Page 3, Column 3)

*Daily News (N. Y.), February 18, 1933, Editorial.* "The repeal measure passed by the Senate is satisfactory because it doesn't contain the no-more-saloon and other riders with which dry Senators tried to make it a repealer that wouldn't repeal. The only sop it does throw to the drys is a clause guaranteeing dry States Federal protection against wet States—a foolish because unnecessary clause, but not a harmful one in itself." (Page 12, Column 1)

*New York Herald Tribune, February 17, 1933, Editorial.* "The Democratic platform called for naked repeal 'and the Senate resolution appends a clause which would incorporate in the Constitution the provisions of the Webb-Kenyon Act.' But the difference is not worth a quarrel." (Page 14, Column 1)

*Boston Evening Transcript, December 4, 1933, Current Comment—from the Hartford Courant:* "The States are free to regulate liquor; but the Federal Government does intend to exercise such oversight over the entire liquor traffic as will protect dry States in the right of choice. All this is in conformity with the Webb-Kenyon and the Reed Bone-Dry Acts which ante-dated the Eighteenth Amendment.' " (Part 2, Page 3)

3. *Lay Comment.*

*New York Times, December 5, 1933*—by Arthur Krock:

Observing that some repeal leaders did not like the Federal control that was being imposed: They thought "they had sent the liquor question back to the States. The victorious candidates had run on such a platform. Most critics of prohibition had agreed that its chief defect was implicit in the attempt to regulate Federally * * * The Webb-Kenyon Law and the Reed Amendment are to be in force after repeal, and these offer all possible Federal protection to the dry States against the importation of liquor." The basic philosophy that it is the responsibility of the general government to regulate the liquor traffic "is antithetic" to the belief of many leaders in the repeal movement "that the vote of the people was to send the problem back to the States, limiting Federal supervision to what it was prior to 1917."

*New York Herald Tribune, December 1, 1933*—Column by Walter Lippmann: "the Twenty-first Amendment does not merely repeal the Eighteenth. It contains a second section which prohibits the importation or transportation of liquor into any State where the effect would be to violate the laws of that State. This prohibition has to be enforced by the Federal Government." (Page 17, Column 1)

*The Deseret News, Salt Lake City, Utah, February 17, 1933,* Daily Feature Column by David Lawrence—discussing the "compromise" nature of the Senate resolution: "The extreme wets, who argued against inclusion of the clause, protecting dry States with constitutional power, contended that existing Federal law would be sufficient. The dry State defenders declared, however, that it was not desirable to remain under the whim of a majority of Congress * * * with a constitutional prohibition, they feel that they are protected with the full force of the Constitution and that, irrespective of majority rule of Congress they can invoke Federal protection." (Page 4)

*New York World-Telegram, December 4, 1933*—Feature article by Wm. Engle, "Looking in the Glass After 13

Years": "The Twenty-first Amendment not only repeals the Eighteenth but contains a section which prohibits the importation or transportation of alcoholic beverages into any State where the effect would be to break that State's laws.

"Just how the Government is going to do this, under the Webb-Kenyon Act now going back into effect, with a dry force cut to 700 men, is not clear." (Page 21)

*New York Herald Tribune, February 17, 1933*—Comment by Dr. Nicholas Murray Butler: "The section which writes the Webb-Kenyon Act into the Constitution is unnecessary and probably harmful, but it is not important enough to fight about." (Page 7, Column 2)

*New York Times, February 21, 1933*—Statement by Mrs. Ella A. Boole, World President, W. C. T. U.: "The repeal amendment, if ratified, will return conditions as they were before the Eighteenth Amendment was adopted, with the wets largely in charge of legislation to be enacted by the States." (Page 10, Column 1)

*New York Sun, February 17, 1933*—Formal statement issued by Representative Beck, of Pa., reprospective House action on repeal: "Happily the repeal amendment as now passed removes all our objections. Its present form agrees without consistent policy for an outright repeal which would completely restore home rule to the States in this matter.

"Personally I can see no objection to the constitutional guarantee that the dry States should be protected by Federal power, for such power would exist in any event under the commerce clause of the Constitution." (Page 2, Column 6)

4. *Comment in Legal Periodicals.*

*25 California Law Review 718* (1937), Comment—Intoxicating Liquors in Interstate Commerce: "Had the Twenty-

first Amendment simply repealed the Eighteenth, intoxicating liquor would have been restored, unless and until Congress acted to the contrary, to its status under the Wilson, Webb-Kenyon and Reed Acts. * * * To remove any doubt as to possible repeal by implication, Congress reenacted all three measures. The Twenty-first Amendment not only repealed the Eighteenth, but enacted into the Constitution substantially the provisions of the Webb-Kenyon Act. Section 2 of the Twenty-first Amendment reads * * * " (Page 724)

*21 Cornell Law Quarterly 504* (1936)—State regulation of importation of intoxicating liquor under Twenty-first Amendment: "During the whole period of National prohibition, it was recognized that the right of the State to exercise its police power on liquor shipped in interstate commerce was derived from the Webb-Kenyon Act which remained in effect throughout that period. The repeal of Federal prohibition left the Act unimpaired. However, since this was merely a Congressional Act, there was a possibility of it being changed at any time by a majority vote of Congress. Likewise there was the danger that the Supreme Court would overrule the Clark case. To insure its permanence the provisions of the Webb-Kenyon Act were incorporated into the Twenty-first Amendment." (Page 510)

*28 Illinois L. Rev. 950* (1934), Note—Some Legal Aspects of the Repeal of the Eighteenth Amendment: "The Webb-Kenyon Act, which prohibits shipment of intoxicating liquor into any State in violation of laws of such State is in fact re-enacted into Section 2 of the Twenty-first Amendment, so there is no question as to its legality." (Page 954)

*35 Michigan Law Review 1006* (1937), Case Note on Board of Equalization Case—[Discussing Webb-Kenyon Act]: "The desire of its proponents to have this Act made permanent and to prevent its being subjected to possible invalidity by a later court decision was one of the main

factors which led to its elevation into the Constitution as part of the Twenty-first Amendment." (Page 1008)

*15 New York University L. Q. R. 210, 418* (1938), Johnson & Kessler, The Liquor License System: "The substitution of the Twenty-first Amendment for the Eighteenth has left unimpaired the reserved powers of the States to regulate the liquor traffic. The embodiment of the Webb-Kenyon Act in substance into the second section of this new Amendment has effected a pro tanto repeal of the interstate commerce clause with respect to liquor."

*83 University of Pennsylvania Law Review 510* (1935), A Comparative Survey of Post-Repeal Liquor Legislation: "The Twenty-first Amendment not only repeals the Eighteenth Amendment but also provides for protection of the dry States in the following terms • • • [Section 2]. The inability of the dry States effectively to enforce their dry laws because of lack of power to control interstate shipments was long a source of much agitation before National prohibition. The language of the Twenty-first Amendment, however, merely confirms the State of the law at the time National prohibition went into effect since the Webb-Kenyon Act enacted in 1913 by Congress had divested liquor of its interstate character." (Page 510, Note 2)

*7 So. Calif. L. R. 230* (1934), Case Note—"In Order to safeguard the privileges conferred on the States under the Webb-Kenyon Act and the Reed Amendment, the Twenty-first Amendment, Section 2, transposes from a mere statutory provision into a constitutional amendment the principle that shipment of intoxicating liquors into a 'dry' State is illegal." (Page 232)

*15 Texas Law Review 255* (1937), Case Note discussing *State Board of Equalization v. Young's Market Co.*: "Section 2 of the Twenty-first Amendment, forbidding importation of intoxicating liquors into any State in violation

of the laws thereof, was not meant to enlarge the States' powers beyond those given by the Webb-Kenyon Act, but to secure them should the *Clark Distilling Case* be reversed or the Act repealed." (Page 256)

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# Supreme Court of the United States

OCTOBER TERM, 1938

No. 252

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, and SCHENLEY DISTRIBUTORS, INC.,

Appellants,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 253

BEN BURK, INC.,

Appellant,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 254

JOSEPH E. SEAGRAM & SONS, INCORPORATED, and SEAGRAM-DISTILLERS CORPORATION,

Appellants,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 255

HINRICHS DISTILLED PRODUCTS,

Appellant,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 256

ARROW DISTILLERIES, INC.,

Appellant,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

## APPELLEES' BRIEF

ROY McKITTRICK,
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EDWARD H. MILLER,
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No. 256

ARROW DISTILLERIES, INC.,

Appellant,

*vs.*

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DIVISION OF THE WESTERN JUDICIAL DISTRICT OF MISSOURI

## APPELLEES' BRIEF

## SUMMARY OF ARGUMENT.

I.

In view of the decisions of this Court that a state may impose a discriminatory import duty on intoxicating liquor manufactured outside its borders without violating the Commerce Clause, and that the reasonableness of a state liquor law will not be reviewed by this Court because of the elimination by the Twenty-first Amendment of previously existing constitutional guarantees, the question presented in this case is not an open one, unless those cases are to be reconsidered.

II.

Even apart from those decisions, the Missouri Anti-Discrimination Act is a reasonable exercise of the police power as a measure of economic self-defense. This Court has sanctioned so-called retaliatory laws, and nothing in the language or historical background of the Twenty-first Amendment confines its operation to the protection of so-called "dry" states, or to an effect co-extensive with that of the Webb-Kenyon Act, although no decision of this Court has even so confined the operation of the Webb-Kenyon Act.

## ARGUMENT.

I.

**Under the Decision of this Court in State Board of Equalization of California v. Young's Market Company, the Commerce Clause Cannot Invalidate a State Liquor Law.**

The effect of the Twenty-first Amendment to the Constitution of the United States on the Commerce Clause is the only constitutional issue in this case. No other part of the Constitution, including the Fourteenth Amendment, is mentioned in the brief of appellants.[1] They say the question is if the Twenty-first Amendment repealed the Commerce Clause as far as intoxicating liquor is concerned, or, in other words,

[1]Except the Eighteenth Amendment.

whether intoxicating liquor is in the same situation as it was before the adoption of the Constitution. Presumably they mean a repeal of the Commerce Clause as a means of attacking the validity of a state liquor law, for that is the only case before the Court. With this qualification, appellees are content to have the issue so framed.

The appellants' argument is that the legislative and judicial history of federal liquor regulation prior to the ratification of the Twenty-first Amendment, and the language of the Amendment, demonstrate that it does not wholly withdraw liquor from the protection of the Commerce Clause, and that that it would be contrary to our form of government and the policy of our Constitution to allow any state to erect tariff or prohibitory walls against liquor from other states, with a motive of selfish economic advantage or retaliation.

Manifestly, this position is contrary to the only decisions of this Court construing the Twenty-first Amendment, *State Board of Equalization of California* v. *Young's Market Company*, 299 U. S. 58 (1936), and *Mahoney* v. *Joseph Triner Corporation*, 304 U. S. 401 (1938). See also *Collins* v. *Yosemite Park & Curry Co.*, 82 L. ed. (Advance Sheets), p. 1009 (1938).

Of the language and the importance of the historical background of the Twenty-first Amendment this Court said in the *Triner* case, quoting from the *Young's Market* case:

> " 'The plaintiffs argue that limitation of the broad language of the Twenty-first Amendment is sanctioned by its history; and by the decisions of this Court on the Wilson Act, the Webb-Kenyon Act and the Reed amendment. As we think the language of the Amendment is clear, we do not discuss these matters'." 304 U. S. 404.

Unless this Court is prepared to reconside that language, 29 pages[2] in appellants' brief, devoted to historical background, will be disregarded.

---

[2](pp. 21-27; 33-54).

Appellants' points are these: I "*Apart from the Twenty-first Amendment, the Missouri Retaliation Statute here involved violates the Commerce Clause of the Federal Constitution*". This conclusion is unexceptionable. Of the statute considered in the *Young's Market* case, which imposed a discriminatory license fee on the privilege of importing beer, Mr. Justice Brandeis said:

> "Prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege." 299 U. S. 62.

But the reason offered by appellants for this conclusion, that the Missouri statute would be unconstitutional because it prohibits importation of liquor from some states, while allowing importation from others, is not so clear. Absent the Twenty-first Amendment the reason is superfluous, because discrimination would not be needed to damn a direct burden on interstate commerce. Under the Amendment, the discrimination has judicial sanction in the *Triner* case:

> "We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the *Young's Market Co.* Case, p. 62, 'involve not a construction of the Amendment, but a rewriting of it'." 304 U. S. 404.

Appellants' Point II is that "*The Missouri Retaliation Act involved in these cases is not saved by the Twenty-first Amendment. Nothing contained in that Amendment validates such a statute as this nor gives to the States unlimited power to burden interstate commerce in intoxicating liquors.*" If this contention is not answered by the holding in the *Young's Market* case that a discriminatory state import duty on beer is permissible under the Commerce Clause, it is certainly answered by the statement in the *Triner* case embodied in the last quotation above. And can something be left of the Commerce Clause as a

weapon for attack on state liquor laws, when the Amendment has been declared wholly to repeal the equal protection clause as to liquor, especially when the Amendment specifically relates to transportation and importation, and does not mention equality? As said in the *Triner* case:

> "The state officials insist that the provision of the statute is a reasonable regulation of the liquor traffic; and also, that since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor. As we are of opinion that the latter contention is sound, we shall not discuss whether the statutory provision is a reasonable regulation of the liquor traffic." 304 U. S. 403.

No serious attempt is made by appellants to distinguish the case at bar from the *Young's Market* and *Triner* cases. A few phrases from those cases are quoted, but no serious effort made to analyze, apply or refuse the logic of the opinions. Almost to ignore two such recent decisions of this Court, both obviously in point, which are the only two decisions of this Court on the subject,[3] is so unusual as to suggest that appellants' brief is, in effect, a *de facto* motion for a second rehearing of the *Young's Market* case.

The position of appellees is thus made difficult. If the Court considers the *Young's Market* and *Triner* cases closed, of what value is further argument by appellees, or indeed even the foregoing comments, for the *Triner* decision is scarcely six months old? On the other hand, as appellants' whole argument treats these two decisions as not final, should appellees burden this Court again with the substance of the briefs in those cases? Fortunately the Fourteenth Amendment is excluded from consideration, and appellants' attack narrowed to the Commerce Clause, so against the remote chance that the Court does desire to consider again the Commerce Clause construction, submitted and presumably finally settled in the *Young's Market* case, appellees will take up the argu-

[3]Except perhaps *Collins* v. *Yosemite Park & Curry Co.*, *supra*.

ments advanced by appellants, and attempt to meet appellants on the hypothetical basis of the non-existence of any final construction by this Court of the effect of the Twenty-first Amendment on the Commerce Clause.

## II.

**Apart from the Decisions of this Court in State Board of Equalization of California v. Young's Market Company and Mahoney v. Joseph Triner Corporation, the Missouri Statute is not Subject to Attack Under the Commerce Clause.**

The remaining portion of appellees' argument will assume that this Court is prepared to reconsider its decision in the *Young's Market* case. Only on this assumption would it appear necessary for appellees to address any further argument to the Court. If this assumption is incorrect, the rest of this brief may be disregarded.

The balance of this argument will be subdivided into two points, answering, respectively, the two points in appellants' brief. Appellees' points, like appellants' points, will be designated by Roman numerals, and subdivided into the subdivisions of appellants' brief.

Before passing to appellants' Point I, a reference must be made to appellants' introductory "Scope of the Constitutional Issue" (pp. 7-10). Appellants say (p. 8) that the problem before the Court is still one of prohibition. This observation is not wholly accurate, or consistent with appellants' major proposition that state power over liquor is the same now as it was under the Webb-Kenyon Act, because unless this observation uses the term "prohibition" in the sense of absolute outlawry of liquor for beverage purposes, the ensuing argument is unsupported. Even under the Webb-Kenyon Act, prohibition was largely a question of degree in the several states. For example, in the case of *Clark Distilling Company v. Western Maryland Railway Company*, 242 U. S. 311 (1917), the West Virginia law there considered was not a bone dry law, for under it individual use of liquor was permitted. The Court in that case said:

"* * * the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor." 242 U. S. 323.

Thus the protection of the Webb-Kenyon Act was not confined to the laws of states which outlawed liquor for beverage purposes. Certainly the Wilson Act was not so confined. *Vance* v. *Vandercook Co.*, 170 U. S. 438 (1898). And if the terminology of "dry" and "wet" states is used, instead of the terminology of "prohibition", and if a "dry" state be defined as a state which at least restricts intoxicating liquor to non-beverage purposes, which is the sense in which " 'dry' state" is normally understood, the Wilson Act and the Webb-Kenyon Act were no more confined to the protection of "dry" states than they were confined to "prohibition" states.

The problem, therefore, is not one of absolute prohibition, but of regulation; that is, of the varying kinds of acts involving liquor which are subject to state prohibitions. Some prohibitions, such as selling liquor without a license, are nation-wide. It cannot be asserted that the Twenty-first Amendment or the Webb-Kenyon Act would not apply to that kind of a prohibition. Even under the Eighteenth Amendment, medicinal prescriptions of liquor were not prohibited. *McCormick & Co.* v. *Brown*, 286 U. S. 131 (1932).

**I. It is not certain that the Missouri Statute would, apart from the Twenty-first Amendment, violate the Commerce Clause, if the Webb-Kenyon Act were in effect.**

A. *The Alleged Unwarranted Discriminations.*

Appellants open their argument with an attack on the merits and the motive of the Missouri Law. They ask this Court to consider the question of its reasonableness, and of whether a state may, under its police power, enact this kind of a law, taking into account the purpose which the state seeks to accomplish thereby.

Appellants' brief attempts to convey the impression that the Missouri Anti-Discrimination Act is a harsh statute, conceived as an instrumentality of oppression, without any legitimate motive. Since so much history is digested in appellants' brief, the Court may want to know the historical background of the Missouri Act.

After the repeal of the Eighteenth Amendment, the several states which desired to legalize the liquor traffic were faced with the necessity of formulating completely new schemes of liquor laws. Some of the states, like Missouri, made no attempt to single out liquor manufactured in other states for discrimination, but some states did enact statutes calculated to foster domestic industry at the expense of the liquor industry of their sister states. Among this latter group were all the states where the appellants in these cases manufacture their products. For example, California undertook to impose a five hundred dollar license fee for the privilege of importing beer, *State Board of Equalization* v. *Young's Market Co., supra,* Indiana undertook to impose a fifteen hundred dollar fee for a port of entry permit (R. 22), and Pennsylvania to impose a gallonage tax on liquor from other states which was higher *by one dollar per gallon* than its tax on Pennsylvania liquor (R. 28). These forms of discrimination are only illustrations. The numerous other discriminations in appellants' states against out-of-state liquor are set out in the petitions herein, incorporated in the certificates of the Attorney General of Missouri as to the laws of such states.

The validity of these protective tariff measures was almost immediately questioned in the courts, resulting in the numerous, varying lower court decisions collected in a footnote to the *Young's Market* case opinion. But no seal of approval which was regarded as final was placed on these kinds of measures until this Court handed down its decision in the *Young's Market* case on November 9, 1936.

After the decision in the *Young's Market* case, the State of Missouri was presented with a dilemma which really offered only two choices: First, to adopt for itself and the protection of its citizens and industries similar protective

tariff measures. But a choice of this alternative would not have mitigated but would rather have encouraged the retaliations of an interstate tariff war. The second alternative was to attempt, by all legitimate means at its command, to obtain a repeal of the hostile legislation in the states which had adopted protective tariffs, and this method was chosen by Missouri when in 1937, faced with a rising tide of discriminatory legislation in other states, its General Assembly enacted the Anti-Discrimination Act. This measure is calculated to induce the states which discriminate against Missouri products to remove those discriminations or run the risk of losing the industries located therein which will suffer by reason of Missouri's prohibition of their products,[4] while permitting free entrance and competition in Missouri to the products of states which, like Missouri, do not believe in protective tariffs as a proper barrier against interstate commerce. When and if Missouri can accomplish this purpose of removing these artificial interstate trade barriers, it will be unnecessary even to repeal the Act here attacked, under which free commerce can then flow to the same extent as if the statute had never been enacted. In other words, the Missouri Act is only, and only purports to be, a means to an end.

B. *Limitations on the Police Power.*

The police power argument of appellants centers around the case of *Baldwin* v. *Seelig*, 294 U. S. 511 (1934). This same case was the basis of the same extensive argument in the *Young's Market* case.[5]

What is the police power? Appellants argue that it traditionally means a power authorizing a law enacted to protect the health, morals or safety of the inhabitants of a

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[4] The argument on page 17 of appellants' brief that the burden of the Missouri Act falls on persons outside the state, who are without legislative redress, and for this reason are entitled to special consideration, is fallacious. The only legislative action necessary to eliminate the treatment of which appellants complain is action by the legislatures of their own states.

[5] Appellees' Brief, pp. 66-71; Appellees' Petition for Rehearing, pp. 13-14.

state. Without the *Young's Market* and *Triner* cases, it is possible to refute this contention.

The older cases on police power confined it to laws to protect health, safety or morals. But there is an additional legitimate police power objective, recognized by several decisions of this Court, namely, the right of economic self-defense.

As early as *Barbier* v. *Connolly*, 113 U. S. 27, 31 (1885) Mr. Justice Field said, in speaking of the Fourteenth Amendment:

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, *and to legislate so as to increase the industries of the State*, develop its resources, and add to its wealth and prosperity." (Emphasis of Counsel.)

In the recent prison-made goods cases, *Whitfield* v. *Ohio*, 297 U. S. 431 (1936), and *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U. S. 334 (1937), the same principle was recognized. Chief Justice Hughes, quoting in the latter case from the former, said that the Ohio legislation proceeded "upon the view 'that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison'" (299 U. S. 351), and held that Ohio, under the Ashurst-Sumners Act, could properly exclude convict-made goods coming from other states, harmless in themselves, and with the sole object of economic self-defense of its laboring citizens. The principle in those cases is no different from the principle asserted by the Missouri Act here questioned, and it is also noteworthy that this principle was sustained in the prison-made goods cases as to the regulation of commodities which were usual lawful commodities and over which the states could not attempt to exercise the augmented power that they have a right to exercise over alcoholic liquor.

Perhaps the last and most pertinent enunciation of this economic phase of the police power is contained in the Louisiana Chain Stores Tax case, *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412 (1937), where the Court said:

"In the exercise of its police power the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business, or regulate a business in such manner as to abate evils deemed to arise from its pursuit. Whatever a state may forbid or regulate it may permit upon condition that a fee be paid in return for the privilege, and such a fee may be exacted to discourage the prosecution of a business *or to adjust competitive or economic inequalities.* Taxation may be made the implement of the exercise of the state's police power; and proper and reasonable discrimination between classes *to promote fair competitive conditions and to equalize economic advantages* is therefore lawful." (Emphasis of Counsel.) 301 U. S. 425.

The Court further said:

"The claim is, essentially, that even if local evils flow from the appellant's methods the state cannot control those evils because its power is limited to conditions created by the members of the chain found within the state. The conclusion is that the state must treat these stores as if they were something different from what they really are, since to do otherwise would be to reach beyond the borders of Louisiana for the measure of the tax. The argument answers itself. The policy Louisiana is free to adopt with respect to the business activities of her own citizens she may apply to the citizens of other states who conduct the same business within her borders, *and this irrespective of whether the evils requiring regulation arise solely from operations in Louisiana or are in part the result of extra-state transactions.*" (Emphasis of Counsel.) 301 U. S. 427.

The effect of the foregoing argument is, it is submitted, to establish that the Missouri Act is justified under the police power, as the police power has been expanded by these cases to include the right to encourage home industry—the right of economic self-defense. Thus if this Court should decide to reconsider its decision in the *Young's Market* case as to the effect of the Twenty-first Amendment on the Commerce Clause, and to test the Missouri Act by a standard of reasonableness, it can be sustained as a police power measure.

Appellants argue that a discrimination between manufacturers of liquor in states having certain kinds of laws on the one hand, and manufacturers of liquor of equal quality and purity in states having other kinds of laws on the other, is an arbitrary and improper discrimination. They contend that the products of, for example, The Old Quaker Company, manufacturing in Indiana, may be of equal purity, price and volume with the products of a Maryland manufacturer, that they are no more harmful in the Missouri market than the Maryland products, and therefore that they cannot properly be excluded, and the Maryland products allowed to come in. Inherent harmfulness of a product is not the test of the right of a state to exclude it. Even though Missouri recognizes alcoholic liquor as a lawful commodity in commerce, this does not mean that Missouri cannot, under the Constitution, and even without the Twenty-first Amendment, exclude alcoholic liquor solely because of the conditions in the state of its manufacture. The two prison-made goods cases, *Whitfield* v. *Onio*, 297 U. S. 431 (1937), and *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U. S. 334 (1937), which have been mentioned above, completely dispose of this argument. The latter squarely holds that conditions of manufacture in another state can justify the exclusion of an inherently harmless product, and that conditions of manufacture can act as a substitute equivalent for the inherent harmfulness of diseased or noxious articles.

If counsel for appellees correctly understand appellants' discrimination argument, it attacks the discrimination under the Missouri law on the sole ground that a discrimination

cannot properly be made by the State of Missouri which is based merely on the presence or absence, in the laws of other states, of certain kinds of provisions, especially if its motive is selfish economic advantage or retaliation. The selfish economic motive argument has just been answered. What, then, if the motive is retaliation?

In the case of *Philadelphia Fire Association* v. *New York*, 119 U. S. 110 (1886), this Court considered and upheld a so-called retaliatory state law. It has been over fifty years since that case was decided, and although retaliatory insurance laws are in force in many states, counsel for appellees have been unable to find any subsequent attempt to persuade this Court to abandon or modify that decision. In an annotation in 19 American Law Reports 795, state court decisions dealing with so-called retaliatory laws are collected, and apparently only in the State of Alabama has such a law been declared invalid. The validity of this principle of legislation has evidently been assumed for many years, as the dates of most of the cases cited in the above annotation will testify. Nor has the subject aroused the interest of legal scholars since the turn of the century. The most recent articles discovered are Edward G. Whitney, Commercial Retaliation between the States, 19 American Law Review 62 (1885), and a note in 36 Central Law Journal 5 (1893).

It is particularly interesting to observe that the retaliatory laws have been almost exclusively insurance laws. This Court did not declare the insurance business to be one affected with a public interest so as to be subject to the kind of state regulation to which businesses so charged are susceptible until its decision in *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389 (1914), so that the Court was, in *Philadelphia Fire Association* v. *New York*, dealing with a statute regulating what it then considered a private business. Certainly a retaliatory liquor statute presents a stronger case of validity than that case then presented. At the risk of wearisome repetition, reference is made to such cases as *Clark Distilling Company* v. *Western Maryland Railway Company*, 242 U. S. 311, 332 (1917), where the Court referred to "the enlarged

right" of the states to regulate liquor, and said that "the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest", and *Rippey v. Texas*, 193 U. S. 504, 510 (1904), in which the Court, speaking of the liquor business, said that "the State has absolute power over the subject * * *. It may favor prohibition to just such degree as it chooses."

Classifications based on a difference in the laws of other states have been upheld in numerous instances. In addition to the *Philadelphia Fire Association* case, reference is made to the automobile license cases, *Hendrick* v. *Maryland*, 235 U. S. 610 (1915), and *Kane* v. *New Jersey*, 242 U. S. 160 (1916); the reciprocity provisions in inheritance tax laws which have been upheld by numerous state courts, illustrative of which is the opinion by Chief Judge Cardozo in *City Bank Farmers' Trust Co.* v. *New York Central Railroad Co.*, 253 N. Y. 49, 170 N. E. 489 (1930); this Court's decisions sustaining Congressional liquor legislation such as the Wilson Act, the Webb-Kenyon Act, and the Reed Amendment, and more recently the *Kentucky Whip & Collar* case sustaining the validity of the Ashurst-Sumners Law, which is in almost the identical language of the Webb-Kenyon Act.

The Court is invited to compare the motive of the Missouri Act with the motive of the California Act sustained in the *Young's Market* case, because if California can exclude foreign liquors of all states for no reason except to raise revenue (which is certainly not an argument to support the validity of a law against an attack based on the commerce clause), surely Missouri can also exclude the liquor of some states for a motive which is obvious, and to promote one of the chief original aims of the Constitution of the United States, namely, free commerce among the states.

Appellants stand behind the tariff walls of their respective states, asserting that the tariffs enacted by those states to favor their products and to oppress Missouri products are valid and perfectly proper, and then ask this Court to prevent Missouri from taking the only step open to her to attempt to obtain a free market and fair treatment in those states. They

attempt to justify this position by saying that Missouri cannot penalize the products of a state because that state does something which the *Young's Market* case held it may legally do. The other state's law is valid for the very reason that this Court has said that a state may treat foreign liquor in any way it wants, and for appellants to say that the fact that Pennsylvania or Indiana or Massachusetts can do what they want to Missouri liquor, proves that Missouri cannot do what it wants with their liquor, is, in effect, an assertion that things equal to the same thing are not equal to each other.

It is suggested that the Missouri Act is invalid because extra-territorial in its operation, and that the General Assembly of Missouri has no right to concern itself with the regulatory liquor laws of other states, because this is the problem and concern of those other states, free from interference by Missouri.

The State of Missouri makes no attempt by this Act to regulate or interfere with the liquor laws of other states which are enacted to protect the health, safety and morals of the inhabitants of those states, nor does it make any effort to interfere with or induce a change of the revenue or commercial liquor laws of those states, unless and until those states enact strictly commercial liquor laws designed to prevent Missouri products from being introduced into those states, or competing there in the open market. In other words, the Missouri Act only goes into operation when another state enacts a measure not to protect the health, morals or safety of its citizens and which, if it is for the purpose of raising revenue, singles out Missouri products for unfair discriminations. If the other state has a right to enact this kind of a measure, with the sole object of putting the products of Missouri labor at a commercial disadvantage there, then surely Missouri must have the right to interest herself in this law and to attempt, by all the legitimate means in her power, to induce the repeal of that law. When such a law is enacted it is not true to say that such a law is the concern of the state enacting it alone. Such a law is directed at the State of Missouri, and Missouri has the right to protect herself accordingly. Also, if a Pennsylvania law regulating Missouri liquor is solely the concern of Pennsyl-

vania, and if Missouri has nothing to say about it, then what right has a citizen of Pennsylvania, a foreign corporation not licensed to do business in Missouri, like one of the appellants,[6] to concern itself and interfere with the regulatory laws which Missouri may enact as to Pennsylvania liquor? Even before the Twenty-first Amendment, the State of Missouri could have absolutely refused to license any non-resident to sell liquor. *Mette* v. *McGuckin*, 149 U. S. 781 (1892), affirming 18 Neb. 323, 25 N. W. 338 (1885). See *LaTourette* v. *McMaster*, 248 U. S. 465 (1919). And so *a fortiori* after the Twenty-first Amendment. *Premier-Pabst Sales Corp.* v. *Grosscup*, 298 U. S. 226 (1936).

C. *Efforts to exempt intoxicating liquor from protection of Commerce Clause and the result thereof.*

After extracting the police power argument from appellants' points IB and IC, there remains a historical resumé of eighty-four years of federal liquor litigation and legislation. The same thesis is amplified by appellants' Point IIB, and deals with a hypothetical situation, the non-existence of the Twenty-first Amendment. Further consideration thereof will be deferred, as will its answer, until appellants' Point IIB is reached.

II.

**The Twenty-first Amendment removes all doubt of the validity of the Missouri Statute against an attack based on the Commerce Clause.**

The thesis of appellants' point II is that the Twenty-first Amendment does not remove the Commerce Clause *in toto* as a limitation on state power over intoxicating liquor, and that affirmatively, the Twenty-first Amendment is coextensive in effect, and means the same thing as, the Webb-Kenyon Act

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[6] None of the appellants except those in Cases Numbers 255 and 256 are admitted to do business in Missouri as corporations (R. 37, a similar allegation being in the petitions in 253 and 254).

(p. 29). They place their principal reliance on the supposed identity of purpose between the Amendment and the Webb-Kenyon Act.

A. *The Language of the Twenty-first Amendment.*

Small satisfaction is obtainable by appellants from the words of the Twenty-first Amendment. It is suggested that "delivery and use" are the pivotal words, and that it is not "transportation in violation of state laws" which is prohibited, (Mr. Justice Brandeis to the contrary in the *Triner* case, describing "the amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof.'" 304 U. S. 402), but rather "transportation for delivery or use in violation of state laws." Appellants insist that the words "delivery or use" must be given effect. Certainly this is correct. If the Amendment were confined to protecting only transportation in violation of state laws, it would be less adequate than the statutory law existing prior to its enactment. The emphasis of state regulatory laws is rarely on transportation. It is usually on sale and use.[7] Yet if the Amendment did not contain the words "transportation" and "importation", the Commerce Clause would strike down many state laws. This is an obvious reason for the incorporation of the words "transportation" and "importation" in the Amendment. Another is the fact that delivery and use, unrelated to transportation, are not traditionally national matters, but matters of internal concern to the several states. There was no necessity for the Amendment except to affect delivery and use insofar as they were related to interstate commerce and to the Fourteenth Amendment.

The language of the Amendment is awkward. It would have been less awkward, grammatically, if the phrase "of

[7] In the original post-repeal Missouri Liquor Control Act (Laws of Missouri, 1933-1934 Extra Session, pages 77-97), the word "transportation" appears only twice (Secs. 4, 41a). In the Amendments to the Act (Laws of Missouri, 1935, pages 267-285; Laws of Missouri, 1937, pages 527-534) its presence appears to be for the purpose of perfecting the criminal provisions of the Act.

intoxicating liquors" were transplanted from its present position and placed after the word "importation", so that section 2 would read:

> "The transportation or importation of intoxicating liquors into any State, Territory, or possession of the United States for delivery or use therein in violation of the laws thereof is hereby prohibited."

If the Amendment were so rephrased, an argument might be made that the intent was to prohibit only delivery or use in violation of state law, as those phrases would then be contiguous, unseparated by punctuation. However, even then surely "transportation or importation" would be the subject of the sentence. Their separation, even at the cost of grammatical ineptitude, indicates, if the language needs construction at all, an intent to avoid that construction. How can appellants say that it is "the laws of a State with regard to delivery and use which are in the contemplation of the Amendment"? Can "transportation or importation" be ignored under any rule of construction? And if these words "delivery" and "use" have, as suggested, acquired a meaning in the long struggle over prohibition, where is there any justification for a meaning which is not their normal, natural meaning?

B. *The Purpose of the Twenty-first Amendment.*

1. *Antecedent evils—origin of language of Section 2.*

It is said that "delivery" alone was the specific evil dealt with by the Webb-Kenyon Act. The Wilson Act did have a defect, and delivery was the defect, so it was corrected by the Webb-Kenyon Act.[8] No resurrected problem of delivery alone was disturbing the Congress when it considered the Twenty-first Amendment. That had been corrected by the Congress twenty years before.

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[8]Just as the same defect in the Hawes-Cooper Act, 45 Stat. at L. 1084, chap. 79, 49 U. S. C. A. § 65, was corrected by the Ashurst-Sumners Act, 49 Stat. at L. 1084, chap. 412, 49 U. S. C. A. §§ 61, 62. *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co. supra.*

Much stress is laid on the word "divest". A historical description of the origin and use of this word in liquor legislation and decisions ends thus:

> "In such fashion was the theory of the Wilson Act, crystalized in the word 'divest' in the *Rahrer Case*, carried over via the title into the Webb-Kenyon Act and sustained by the Court." (App. Br. p. 38).

Numerous readings of the argument surrounding the importance of the word "divest"; the fact that the Wilson Act was declaratory, the Webb-Kenyon Act prohibitory, but both reached the same result, although the second section of the bill which became the Webb-Kenyon Act was expunged; and that the Twenty-first Amendment also is prohibitory, have failed to vitalize it for counsel for appellees. If the Wilson Act and the Webb-Kenyon Act were different degrees of the exertion of an identical power (App. Br. p. 37 n.), so that they would have had the same effect whether phrased as they were, or whether both were phrased as prohibitions, or both as declarations, no significance is observed in the fact that they were phrased as they were. The same reasoning applies to the change of title of the Webb-Kenyon Act from "An act to prohibit * * * *" to "An act to divest * * *". The Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment are all unambiguous.

It may be of some significance that the Wilson Act requires equality of treatment of imported liquor by its very terms, and that the Webb-Kenyon Act does not. If there were any adjudication that the Webb-Kenyon Act did require equality of treatment by implication, even in the absence of specific language, it might be important. Such a construction of an Act of Congress which admittedly is similar in language to the Twenty-first Amendment, would, before the decisions in the *Young's Market* and *Triner* cases, have offered an argument that discrimination against imported liquor is not permitted under the Amendment. But the research of counsel has disclosed no such case, and the argument

of similarity, predicated on the assumption that no discrimination by a partially wet state against imported liquor was permissible under the Webb-Kenyon Act, is revealed as illusory. And if there is any significance in the legislative history of the Webb-Kenyon Act, it would appear to be in the fact that the second section of the bill as offered specifically required equality of treatment of imported liquor, in language like that of the Wilson Act, and that this section was expunged before the bill became a law.

Appellants conclude their Point IIB1, which brings the historical argument up to the Congressional debates on the Twenty-first Amendment, by saying:

> "The Aim of the Webb-Kenyon Act was to put 'dry' states in a position to deal with all phases of the liquor problem that could arise in a State committed to a policy of prohibition." (p. 41).

Counsel for appellees have carefully compared this entire historical argument with the arguments in the briefs of the parties in the *Young's Market* and *Triner* cases.[9] Apart from the arguments drawn from the supposed importance of the words "delivery" and "use", and the significance attributed by appellants herein to the development of the "divesting" quality of the Federal enactments, nothing has been discovered in appellants' treatment of the historical prelude to the Twenty-first Amendment's submission to the states which was not fully presented to the Court by counsel in those two preceding cases.

2. *Submission by the Congress.*

Pursuing the line of thought embodied in the concluding paragraph of their Point IIB1, quoted above, appellants say that the sole question which Congress intended to submit to the states by section 2 of the Twenty-first Amendment was

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[9] *State Board of Equalization* v. *Young's Market Co.*, Appellees' Brief, pp. 26-52; Appellant's Brief, pp. 29-40; *Mahoney* v. *Joseph Triner Corp.*, Appellant's Brief, pp. 11-29; Appellee's Brief, pp. 4-8.

"whether those states which wished to remain 'dry' after the repeal of the Eighteenth Amendment should be protected, in their desire by a permanent constitutional provision" (p. 42). Appellants say that no issue was raised in Congress on the protection, if any, which was to be granted by the Amendment to "wet" states against rival liquor from other "wet" states.

Probably it is true that the senators addressing themselves to the effect of the Twenty-first Amendment were motivated by a realization of the impermanence of statutory national liquor legislation, and by the possible unconstitutionality of such legislation. Probably it is also true that section 2 of the Twenty-first Amendment is shorter than the Webb-Kenyon Act because it is fitting that a constitutional amendment should not particularize.

Probably it is also true that the senators did not give much, if any, consideration to the effect of the Twenty-first Amendment in permitting state protective tariffs on liquor. They reviewed in their debates the decisions of this Court involving the validity of state liquor laws, but there was no decision of this Court or of any other court, so far as counsel has been able to ascertain, dealing with a state law which attempted, while the Webb-Kenyon Act was in force, to erect a protective tariff wall against out-of-state liquor. Yet this silence of the record cannot mean that the final form of the Twenty-first Amendment which they drafted, if unambiguous in its terms, is not to be given by this Court that unambiguous meaning.

If there is any significance in the shaping of the Twenty-first Amendment by the Senate, it would seem to rest on the fact that the original resolution prohibited the introduction of liquor into any state "if the laws in force therein *prohibited* such transportation or importation", whereas the final form of the amendment is not so qualified. (App. Br. p. 46.) The same significance might be attributed to Senator Glass's substitute resolution, which was likewise qualified, and which failed of passage. *Id.* These facts, presenting as they do two alternatives of which one was rejected, speak more plainly than the failure of Senators Blaine and Glass to point

out how their resolutions differed from the form which was adopted.

The importance of this rejection is emphasized by the fact that the Reed Amendment, approved March 3, 1917,[10] the last legislative step before National Prohibition, only applied to states which "prohibit" intoxicating liquor for beverage purposes. Congress, in framing the Twenty-first Amendment, passed over this more recent Act, rejecting language which would have confined the operation of the Twenty-first Amendment to "dry" states. See *United States* v. *Hill*, 248 U. S. 420 (1919).

3. *Public Opinion and Ratification.*

Admittedly the material presented by appellants under this point has not been presented to this Court before. However, appellants fairly admit that the record of ratification furnishes little aid in construing the effect of section 2 of the Amendment on the Commerce Clause. Truly the sentiment throughout the nation, as represented in the conventions, was a repeal sentiment. Undoubtedly that thought predominated in the minds of the electors. It is not supposed that appellants contend that because the text of section 2 was not on the ballots in every state, there was not a proper submission of the Amendment to the conventions so as to invalidate its ratification. And if it was validly ratified, it must have been ratified in the form in which submitted; which must be given its plain meaning. It is often that part of a contract or statute to which little attention was given by the parties that later is called into question.

4. *Action of Congress Subsequent to Twenty-first Amendment.*

Appellants argue that the present existence of federal liquor laws like the Federal Alcohol Administration Act,[11] proves that the Congress still has power under the Commerce Clause to regulate liquor. If appellees admit that the Federal

[10]39 Stat. at L. 1069, chap. 162, as amended, 18 U. S. C. A. § 341.

[11]August 29, 1935, 49 Stat. at L. 977, chap. 814, 27 U. S. C. A. §§ 201-212.

Alcohol Administration Act is referable to the Commerce Clause, and not to the taxing power, this admission cannot prejudice their position. Perhaps the Commerce Clause is being utilized by this federal legislation, but it only operates on liquor in interstate commerce up to the point where that liquor reaches the boundary of a state. In other words, the Twenty-first Amendment is only applicable to liquor transported *into* the state for delivery or use therein in violation of the laws thereof. As an example, if Indiana, Illinois and Missouri were "wet" states, and Kansas a "dry" state, and liquor were shipped from Indiana to a point of destination in Kansas, the Twenty-first Amendment would apply only to that part of the carriage beginning at the Kansas state line. Or suppose all existing state liquor laws were repealed, it is unnecessary to point out that the Congress then could, under the Commerce Clause, regulate the interstate liquor traffic.[12]

## CONCLUSION.

It is respectfully submitted that this Court has before it nothing previously unconsidered and adjudicated; that the Missouri Act here challenged is a reasonable police power enactment; that even if it were not, the Twenty-first Amendment immunizes it from a Commerce Clause attack; that the lower court correctly dismissed the bills of complaint, and that its judgments should be affirmed.

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[12] *Collins* v. *Yosemite Park & Curry Co.*, decided May 31, 1938, 82 L. ed. (Advance Sheets) 1009, holding that the United States, and not the State of California, may regulate intoxicating liquor in Yosemite Park, in which the Court said (p. 1020): "Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the Twenty-first Amendment is not applicable."

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# SUPREME COURT OF THE UNITED STATES.

Nos. 252, 253, 254, 255 and 256.—October Term, 1938.

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| 252 | Joseph S. Finch & Company, et al., *vs.* Roy McKittrick, Attorney General of the State of Missouri, et al. | Appeals from the District Court of the United States for the Western District of Missouri. |
| 253 | Ben Burk, Inc., *vs.* Roy McKittrick, Attorney General of the State of Missouri, et al. | |
| 254 | Joseph E. Seagram & Sons, Inc., et al., *vs.* Roy McKittrick, Attorney General of the State of Missouri, et al. | |
| 255 | Hinrichs Distilled Products, *vs.* Roy McKittrick, Attorney General of the State of Missouri, et al. | |
| 256 | Arrow Distilleries, Inc., *vs.* Roy McKittrick, Attorney General of the State of Missouri, et al. | |

[January 3, 1939.]

Mr. Justice Brandeis delivered the opinion of the Court.

The State of Missouri approved April 8, 1937,[1] an Act, sometimes called the Missouri Anti-Discrimination Act, sometimes the Missouri Retaliation Act. It provides in Section 4:

"The transportation or importation into this state, or the purchase, sale, receipt or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined."

The statute defines what exactions, prohibitions and restrictions imposed by laws of the several states shall be deemed "discrimina-

[1] Laws of Missouri 1937, pp. 536-543.

tions" imposed upon the importation into the several states of alcoholic liquor manufactured in Missouri; requires the Attorney General to determine whether there exists therein any such discrimination; and, if he find any such discriminatory law, to specify the same in a certificate to be filed with the Supervisor of Liquor Control. The Supervisor is directed to publish notice of the certificates and to advise all licensees that it will be unlawful to import into Missouri or to purchase, receive, sell or possess in Missouri any liquor manufactured in a discriminating state. Pursuant to these provisions, the Attorney General filed, in October, 1937, certificates with the Supervisor declaring that the States of Indiana, Pennsylvania, Michigan and Massachusetts are "states in which discriminations existed" as defined by the Missouri statute.

To enjoin enforcement of this provision of the Missouri statute, these five suits were brought, in the federal court for the western district of the state, against the Attorney General and the Supervisor of Liquor Control. Each bill charges that the provision violates the commerce clause of the Federal Constitution and the equal protection clause of the Fourteenth Amendment.[2] In four of the cases the bill alleges that the plaintiff is a citizen of a state other than Missouri; that it manufactures liquor in one of the states certified as "discriminating"; that it holds a non-resident Missouri permit under which it imports and sells in Missouri a part of its products; and that it would be irreparably injured if the provision of the Missouri statutes were enforced. The fifth case differs only in that the bill alleges that the plaintiff is a citizen of Missouri engaged there in the rectifying and bottling business for which it imports liquor manufactured in a state certified as "discriminating." As both a temporary and a permanent injunction was sought in each case, each was assigned for hearing before a three-judge court. In each the defendants moved to dismiss the bill. Later, the cases were consolidated for hearing and review; and it was agreed that when the court heard the application for the temporary injunction it should finally determine the causes. The District Court denied the applications for a temporary and a permanent injunction and dismissed the bill in each case. 23 Fed. Supp. 244. But the temporary restraining orders issued upon the filing of the

[2] The bill also alleged that the provision violated the due process clause of the Fourteenth Amendment, the contract clause and the privileges and immunities clause.

bills were continued until the final determination of the appeals to this Court.

The claim of unconstitutionality is rested, in this Court, substantially on the contention that the statute violates the commerce clause.[3] It is urged that the Missouri law does not relate to protection of the health, safety and morality, or the promotion of their social welfare, but is merely an economic weapon of retaliation; and that, hence, the Twenty-first Amendment should not be interpreted as granting power to enact it. Since that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. As was said in *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 62, "The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." To limit the power of the states as urged "would involve not a construction of the Amendment, but a rewriting of it." See also *Mahoney* v. *Jacob Triner Corporation*, 304 U. S. 401; *Indianapolis Brewing Co.* v. *Liquor Control Commission*, No. 130, decided this day.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

[3] The arguments in appellant's brief are confined to the commerce clause. The statement of points to be relied upon includes all the contentions of the bill.